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EXAMPLES AND THEIR SOLUTIONS

## PRINCIPLES OF LAW

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HUSBAND AND WIFE  
DIVORCE

PARENT AND CHILD  
GUARDIAN AND WARD  
NOTARIES PUBLIC

JUSTICES OF THE PEACE

PATENTS, COPYRIGHT, AND TRADE-MARKS  
INSURANCE

MINES AND MINING

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## PREFACE

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The International Library of Technology is the outgrowth of a large and increasing demand that has arisen for the Reference Libraries of the International Correspondence Schools on the part of those who are not students of the Schools. As the volumes composing this Library are all printed from the same plates used in printing the Reference Libraries above mentioned, a few words are necessary regarding the scope and purpose of the instruction imparted to the students of—and the class of students taught by—these Schools, in order to afford a clear understanding of their salient and unique features.

The only requirement for admission to any of the courses offered by the International Correspondence Schools is that the applicant shall be able to read the English language and to write it sufficiently well to make his written answers to the questions asked him intelligible. Each course is complete in itself, and no textbooks are required other than those prepared by the Schools for the particular course selected. The students themselves are from every class, trade, and profession and from every country; they are, almost without exception, busily engaged in some vocation, and can spare but little time for study, and that usually outside of their regular working hours. The information desired is such as can be immediately applied in practice, so that the student may be enabled to exchange his present vocation for a more congenial one or to rise to a higher level in the one he now pursues. Furthermore, he



wishes to obtain a good working knowledge of the subjects treated in the shortest time and in the most direct manner possible.

In meeting these requirements, we have produced a set of books that in many respects, and particularly in the general plan followed, are absolutely unique. In the majority of subjects treated the knowledge of mathematics required is limited to the simplest principles of arithmetic and mensuration, and in no case is any greater knowledge of mathematics needed than the simplest elementary principles of algebra, geometry, and trigonometry, with a thorough, practical acquaintance with the use of the logarithmic table. To effect this result, derivations of rules and formulas are omitted, but thorough and complete instructions are given regarding how, when, and under what circumstances any particular rule, formula, or process should be applied; and whenever possible one or more examples, such as would be likely to arise in actual practice—together with their solutions—are given to illustrate and explain its application.

In preparing these textbooks, it has been our constant endeavor to view the matter from the student's standpoint, and to try and anticipate everything that would cause him trouble. The utmost pains have been taken to avoid and correct any and all ambiguous expressions—both those due to faulty rhetoric and those due to insufficiency of statement or explanation. As the best way to make a statement, explanation, or description clear is to give a picture or a diagram in connection with it, illustrations have been used almost without limit. The illustrations have in all cases been adapted to the requirements of the text, and projections and sections or outline, partially shaded, or full-shaded perspectives have been used, according to which will best produce the desired results. Half-tones have been used rather sparingly, except in those cases where the general effect is desired rather than the actual details.

It is obvious that books prepared along the lines mentioned must not only be clear and concise beyond anything

heretofore attempted, but they must also possess unequaled value for reference purposes. They not only give the maximum of information in a minimum space, but this information is so ingeniously arranged and correlated, and the indexes are so full and complete, that it can at once be made available to the reader.

Six of the volumes composing this library are devoted to legal subjects. This volume, the fourth of the series, treats on the law of husband and wife, supplemented by a paper on divorce. There is no subject in the science of law that attracts more attention than this, the principal theme on domestic relations, nor is there one, knowledge of which is more to be desired for practical educational purposes. The same may be said concerning parent and child, guardian and ward, which are also treated herein. Included in the volume are other important subjects, notably the law of patents, copyright, and trademarks. This is of special value to inventors and authors. The law of mines and mining is the concluding subject. This industry has brought forth many intricate questions of law that are herein explained, and will be of special value to mine operators and their employees.

The method used in numbering the pages and articles is such that each subject or part, when the subject is divided into two or more parts, is complete in itself; hence, in order to make the index intelligible, it was necessary to give each subject or part a number. This number is placed at the top of each page, on the headline, opposite the page number; and to distinguish it from the page number it is preceded by the printer's section mark (§). Consequently, a reference such as § 37, page 26, will be readily found by looking along the inside edges of the headlines until § 37 is found, and then through § 37 until page 26 is found.

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# THE LAW OF HUSBAND AND WIFE

(PART 1)

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## INTRODUCTION

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### THE MARRIAGE RELATION

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#### DEFINITIONS

**1. Marriage.**—The term **marriage**, as used in the sense denoting relation, is the civil status of a man and a woman lawfully united in the relation of husband and wife; the state or condition of being married; wedlock. Regarded as the act of marrying, or the joining in wedlock, it means the solemnization of the ceremony which creates the legal union of a man with a woman.

“The expression ‘agreement of marriage,’” as explained by an authority, “denotes either a contract between parties to solemnize together a marriage at a future time, or the solemnization itself. The term contract to marry never points to an actual, executed marriage, but a ‘contract of marriage’ often does . . . Marriage, as distinguished from the agreement to marry and from the act of becoming married, is a civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony.”<sup>1</sup>

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<sup>1</sup> Bish. Mar. & D., Vol. 1, Secs. 9, 11.

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So far as its validity in law is concerned, in many of the United States, marriage is declared to be a civil contract.<sup>2</sup> It is considered in every country as a contract, but the better opinion appears to be that marriage is something more than a mere civil contract.<sup>3</sup> "It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of obligation, different from what belongs to ordinary contracts."<sup>4</sup> In the sense that it is substantially founded on mutual consent, marriage is a contract, because it cannot be valid without the spontaneous concurrence of two competent minds; but it is a contract of its own class, and, unlike ordinary contracts, is of public right, because it establishes fundamental and most important domestic relations. Society being interested in the existence and harmony of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the state, and cannot, like mere contracts, be dissolved by mutual consent only by the contracting parties, but may be abrogated by the sovereign will, either with or without the consent of both parties, whenever the public good, or justice to both or either of the parties, will be thereby subserved.<sup>6</sup>

The proper view, therefore, to be taken is that adopted by modern text-writers, who prefer to regard marriage as a status or personal relation arising out of a civil contract to which the consent of parties capable of making that contract is necessary.<sup>5</sup> As distinguished from other contracts, "marriage is a contract altogether of a peculiar kind; it stands alone, and can be assimilated to no other contract whatever."<sup>7</sup> The contracting parties, having entered into the married state, have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which vest not upon their agreement, but upon the general law of the

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<sup>2</sup> Stim. Am. Stat. Law, Sec. 6,101.

<sup>3</sup> Bouv. Law Dict.

<sup>4</sup> Story Conf. L., Sec. 108, n.

<sup>5</sup> 7 Dana (Ky.) 181 (1838).

<sup>6</sup> Cal. Civ. Code, Sec. 55; Fras. Dom. Rel. 87, 88; Story Conf. L., Secs 109-111.

<sup>7</sup> Bish. Mar. & D., Vol. 1, Sec. 27.

state, statutory or common, which defines and prescribes these rights, duties, and obligations. They are of law, not of contract. It was of contract that the relation should be established, but being established, the power of the parties, as to the extent or duration of these rights, duties, and obligations, is at an end. Their rights under it are determined by the will of the sovereign as evidenced by law.\*

**2. Miscellaneous Terms.**—The marital status, or relation of husband and wife, being capable of existing only in pairs, must be created by the coexistence of the necessary parties capable of contracting; hence, the spouses, or partners in marriage—one, the husband, the other, the wife.

A **husband** is defined to be a man who is married to a woman, who bears the correlative title of wife. He is the one who assumes the rights and responsibilities of the male party in the marriage relation.

A **wife** is a woman who is united to a man in wedlock; one who has a husband and who assumes the duties of the female party to a marriage contract.

A **morganatic marriage** is the union of a man of high rank to a woman of lower station, which is contracted upon condition that neither the wife nor the issue, if any, shall claim the title, or rank, or property of the husband. This kind of marriage was common during the middle ages and is occasionally contracted in this age, in some countries. A regular marriage ceremony is performed in forming the union, and any children born to the spouses are considered legitimate, though they cannot inherit under the terms of the contract. The common epithet applied to a morganatic marriage is *left-handed marriage*.

A **Scotch marriage**, so called because such wedlock is recognized by the Scotch law, is a marriage by mutual consent, without formal solemnization, the parties declaring that they presently do take each other for husband and wife.

**Monogamy** is the state of being married to only one person at one time; the practice of marrying only once, or the

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\* 51 Me. 483 (1863).

principle which upholds that practice, or forbids remarriage after the death of a former husband or wife (opposed to digamy, bigamy, and polygamy).

**Digamy** is a term applied to the second marriage of any person; opposed to monogamy.

**Bigamy**, literally, is double marriage; the marriage of a man or woman who has another lawful spouse living; the crime of marrying any other person while having a legal spouse living.

**Polygamy** is the condition of having more than one wife or husband at the same time; the practice of having a plurality of wives.

#### ESSENTIALS TO A VALID MARRIAGE

**3. Mutual Consent.**—The principal essential to a valid marriage is a present agreement between competent parties to take each other for husband and wife.\* Both parties to marriage must consent mutually to be joined in the bonds of matrimony by words indicating a union at the present time, and the agreement must be to enter into what the law holds to be the marriage relation. An agreement by words denoting a future promise to marry is not sufficient, unless followed by consummation. No particular manner is prescribed for the expression of consent to form the marriage relation, other than such as local statutes prescribe, but there must be mutual concurrence in the intention of both parties,<sup>10</sup> as in every other contract. A marriage ceremony actually and legally performed, though in jest and not intended to be a contract of marriage, being so understood and treated by both parties at the time, is not a marriage contract.<sup>11</sup>

Generally, a marriage is valid, which is contracted by competent parties who mutually consent thereto, and who are married in accordance with formalities made necessary by the common law, or by the requirements of such statutory laws which distinctly state a marriage shall be void for non-compliance therewith, notwithstanding the parties fail to

\* 4 N. Y. 230 (1850).

<sup>11</sup> 21 N. J. Eq. 225 (1870).

<sup>10</sup> 2 N. H. 268 (1820); 2 Cal. 508 (1852); 12 Vt. 896 (1840); 6 Binn. (Pa.) 405 (1814).



procure a license, or fail to comply with any other preliminary directions of statute law.<sup>12</sup> However, all the requirements of the common law and of statutory laws should be complied with; the contract should be celebrated as prescribed by the law of the place of contract, followed by a consummation of the marriage.<sup>13</sup>

**4. Solemnization.**—The celebration of a marriage is the performing of certain formalities by the parties in the presence of a competent celebrant, such as a minister, judge, magistrate, mayor, or other official, clothed by law with the authority to act as such; and the formalities are either religious or civil, just as prescribed by statutes in the several states, or countries, and which are prescribed for the benefit of the public.

The usages of most civilized nations seem to require a solemnization of some form before witnesses; yet, if a statute do not declare the contract void, if not solemnized before a magistrate or minister, the marriage is valid. Where an acting magistrate or minister solemnizes a marriage, but under such circumstances as to expose him to a penalty, the marriage is still valid as to the parties joined and as to the public.<sup>14</sup>

A person cannot officiate as the celebrant of his own marriage where the law has provided that a marriage is to be celebrated by an officiating clergyman, or other official; and the law does not admit any difference between the marriage of a clergyman and a layman. So that where a clergyman officiates at his own marriage, the law having provided that a marriage must be celebrated in the presence of a clergyman in holy orders, the fact that the bridegroom is himself such a clergyman, there being no other clergyman present, will not make the marriage valid.<sup>15</sup>

**5. Solemnization of marriage is controlled chiefly by the common law.** In jurisdictions which have not mandatory

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<sup>12</sup> 3 Wall. (U. S.) 175 (1865).

<sup>13</sup> 3 A. K. Marsh. (Ky.) 368, 377 (1820).

<sup>14</sup> 2 N. H. 268 (1820).

<sup>15</sup> 2 H. L. C. (Eng.) 274 (1861); 10 Cl. & Fin. (Eng.) 534 (1843).

statutes providing how marriage shall be celebrated, but only directory statutes, providing for certain previous permission, or notice, who may perform the ceremony, and what record shall be kept, a solemnization by the common-law doctrine constitutes a good marriage; or, as one of the best authorities has said, "It has become established in authority that a marriage good at the common law is good notwithstanding the existence of any statute on the subject, *unless the statute contains express words of nullity*."<sup>16</sup>

A statute may declare that no marriage is valid unless it be solemnized in a prescribed manner, which is *mandatory*, and a different kind of enactment from one requiring a marriage to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license or publication of banns, or attested by witnesses, which provisions are merely *directory*, and not destructive of the common-law right to form the marriage relation by words of present assent.<sup>17</sup> Such a statute does not deny validity to marriages not formed according to their direction, but affects only the legality of a marriage. The terms *validity* and *legality* have very different meanings in their application in this connection, which may be apparent from what has already been explained. When *validity* is regarded in the light of designating the force, soundness, and stability of a marriage relation, and *legality*, as applied to a marriage, is accepted as meaning one solemnized in conformity to a law enacted to regulate certain formalities concerning the entering into the bond of matrimony, the distinction will be obvious. In the United States, the settled doctrine of the courts is, that where parties agree presently to take each other for husband and wife, whatever the form of ceremony, or if all ceremony be dispensed with, and from that time they live together professedly in that relation, a valid marriage is constituted by the proof of these facts.<sup>18</sup>

It is not essential that the words of a marriage service, which are directed to be repeated by a man and woman, shall

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<sup>16</sup> Bish. Mar. & D., Sec. 424.

<sup>17</sup> 96 U. S. 76 (1877).

<sup>18</sup> 31 Mich. 126 (1875).

be actually said. The ceremonies required by the law are complied with, when the hands of the parties are joined together and the clergyman, or other official, pronounces them man and wife; if they understand by the act that they are to render marital duties—that they have agreed to cohabit together—they are married.<sup>19</sup>

The consummation of marriage is the assumption of the rights, duties, and obligations of the marriage relation by the parties; it contemplates cohabitation, which implies sexual rights and duties, known as intercourse.

**6. License.**—The procurement of a marriage license is a statutory requirement, in some states, preliminary to solemnization of a marriage. The effect of non-compliance with the statute is not to render the marriage void, but the provision is held to be a directory one—one prohibitory and penal with respect to the officer who performs the ceremony.<sup>20</sup> The statutes of some states direct that no person shall be joined in marriage, until a license shall have been obtained for that purpose from the clerk of the orphans' court in the county wherein the marriage is performed, and require that one or both of the applicants shall be identified to the satisfaction of the clerk, and provide that a license so issued shall authorize the marriage ceremony to be performed in any county of the state, and that a duplicate certificate shall be returned duly signed by the person solemnizing said marriage, to the clerk of the orphans' court of the county in which the marriage is solemnized, which shall be recorded by the said clerk in the marriage-license docket and filed among the records of the office.<sup>21</sup> In cases in which the parties intend to solemnize the marriage themselves, it is provided by the statutes that such marriage shall not take place until the clerk of the orphans' court of the proper county shall certify their right to do so in a declaration in a form prescribed by the statutes.<sup>22</sup>

<sup>19</sup> 1 Kay & J. (Eng.) 4 (1854).

<sup>20</sup> 17 B. Mon. (Ky.) 154 (1856).

<sup>21</sup> Pa. P. L., 1885, p. 146; Pa. P. L., 1893, p. 27.

<sup>22</sup> Pa. P. L., 1885, p. 146.



**7. Banns,** the formal announcement of an intended marriage, are required to be published in England, as a preceding formality to a proposed marriage.<sup>23</sup> Like the license formality, publication of banns is merely directory and does not affect the validity of a marriage; but, where required, the publication must be in the true names of the parties, and conform strictly to the law directing them, to be of any avail.<sup>24</sup>

**8. Consent of Parents.**—The marriage of persons competent to marry is valid at common law, without the consent of parents. In England, the law was changed by the Marriage Act, which provides that the marriage of minors, not being a widower or widow, solemnized by license (not including marriages by banns) should be void when entered into without the consent of the father if living, or if dead, of the guardian or mother, or of the court of chancery.<sup>25</sup> Subsequently, this law proving too stringent, from which many mischiefs resulted, because of the absolute nullity created, new legislation was enacted which made the consent of parents merely directory, which did not render a marriage void.<sup>26</sup> The new statute merely creates a penalty for failing to obtain consent—the forfeiture of all property accruing from the marriage.<sup>27</sup> In some of the United States, statutes exist which, under some interpretations, are regarded as making the marriage of a minor, without the consent of parents, a nullity; but usually such statutes are regarded as not affecting the validity of marriages.<sup>28</sup>

The general rule of law is that a marriage valid where it is celebrated is valid everywhere; but the converse to this is equally general, that a marriage void where it is celebrated is void everywhere.<sup>29</sup> The validity of a marriage contract is to be determined by the law of the state where it was entered into; if valid there it is to be recognized as such elsewhere, unless contrary to the prohibitions of natural laws, or the express prohibition of a statute.<sup>30</sup>

<sup>23</sup> 1 B. & A. (Eng.) 190 (1830).

<sup>24</sup> 3 M. & S. (Eng.) 250 (1814).

<sup>25</sup> 26 Geo. II, c. 33, Sec. 11.

<sup>26</sup> Bish. Mar. & D., Sec. 552.

<sup>27</sup> 4 Geo. IV, c. 76.

<sup>28</sup> 1 Gray (Mass.) 119 (1854).

<sup>29</sup> 31 Mich. 127 (1875); 17 B. Mon. (Ky.) 154 (1856).

<sup>30</sup> 86 N. Y. 18 (1881).

## COMPETENCY OF PARTIES

9. Competent parties to a marriage are those who are *free to contract*, such as are *sane*, under no mental disability, *not impotent*, nor *too closely related by blood or marriage*, and are of *full legal age*, which, at common law, is fourteen years in males and twelve years in females, which is still the legal age of consent in some of the old commonwealths.

A marriage solemnized between parties of the common-law ages is valid, without the consent of the parents or guardians, notwithstanding statutory prohibition of ministers and magistrates, under a penalty, for marrying a female under the age of eighteen, or a male under the age of twenty-one years, without the consent of parents. The law looks beyond the welfare of an individual and a class, in regulating the intercourse of the sexes, and regards the general interest of society, and seeks, in the exercise of a wise and sound policy, to chasten and refine this intercourse, and to guard against the evils which would result from illicit cohabitation. With this view, in order to prevent fraudulent marriages, the common law has fixed that period in life, when the sexual passions are usually first developed, as the one when the infants are deemed to be of age of consent, and capable of entering into the contract of marriage.<sup>31</sup>

The effect of statutory prohibitions is not to render duly solemnized marriages of persons under certain ages, fixed by the statutes, void, but, as said above, they are only directory upon ministers and magistrates, to prevent the solemnization of marriages when the prescribed conditions and formalities have not been fulfilled; but, in the absence of any provision declaring marriages not celebrated in a prescribed manner or between parties of certain ages absolutely void, it is held that all marriages regularly made according to the common law, are valid and binding, although contracted in violation of the specific regulations imposed by statutes.<sup>32</sup> In North Carolina, it is held that the only effect of a statute is to make sixteen instead of fourteen years in respect to males, and

<sup>31</sup> 1 Gray (Mass.) 119 (1854).

<sup>32</sup> 7 Mass. 405 (1810); 6 Binn. (Pa.) 408 (1814).

fourteen instead of twelve years in respect to females, the ages at which parties are capable of making a perfect marriage, leaving the rule of the common law unaltered in other respects.<sup>33</sup>

Statutes prescribing at what ages persons may marry exist in most jurisdictions, the age of consent as fixed by the common law being enlarged. These statutes are to be construed according to the rules stated above. Generally, the laws of the place where the marriage is celebrated determine the validity of the union, and the law of the parties' domicile determines the capacity of the persons who contract a marriage.<sup>34</sup>

**10.** A person **free to contract** is one who is not already married, or one who having been married has been legally adjudged as divorced absolutely, in which event both would be free to marry again, except in certain jurisdictions where statute law prohibits marriage after divorce; or one whose marriage has been dissolved by the death of one of the parties, in which case the survivor would be free to marry again.<sup>35</sup> The presumption of death is specified, by statute in most jurisdictions, to exist where one of the contracting parties to a marriage has been absent, unheard of, or beyond seas for seven years. But such statutes do not apply to cases where the party who marries a second time knows that his or her absent spouse by a former marriage is alive, nor is such second marriage valid, if the first still exist.<sup>36</sup>

Though a man marry repeatedly he can have but one lawful, living wife. So long as she is living and the marriage bond remains in force, all his subsequent marriages are utterly null and void, and generally require no decree of a court to annul them, for they never had any legal existence.<sup>37</sup> Statute law makes a person who marries another person, while having a legal spouse living, guilty of bigamy—a felony which did not exist at common law.<sup>38</sup> The marriage of a woman with a man whose wife by a former marriage is still

<sup>33</sup> 7 Jon. (N. C.) 194 (1859).

<sup>34</sup> 10 Watts (Pa.) 158 (1840).

<sup>35</sup> 86 N. Y. 18 (1881); 38 Md. 357 (1873).

<sup>36</sup> 50 Md. 161 (1878); 114 Mass. 563 (1874).

<sup>37</sup> 22 Ala. 86, 101 (1853); 23 Pa. 104 (1854).

<sup>38</sup> 50 Md. 161 (1878).



living, undivorced, is void, and her subsequent marriage with another is valid, although the husband by the void marriage is still living.<sup>39</sup> Although a decree annulling a marriage void from beginning is usually considered not necessary to enable the injured party to marry again, it has been ruled otherwise in Pennsylvania, where a man married a woman who had a husband then living, and the man petitioned the court to annul the marriage. It was held that it is only after a sentence nullifying or dissolving a marriage, or a conviction of bigamy, that the parties are at liberty to marry again, basing the decision on a statute which provided for the relief of an innocent and injured party who has entered into the marriage where one of the parties is under natural or legal incapacity of faithfully discharging the matrimonial vow, or is guilty of acts inconsistent with his contract.<sup>40</sup>

The marriage of one who has a suit for divorce pending, and who has obtained a decree *nisi*, a provisional decree, which by its terms is to be made absolute on notice, after six months' publication "unless sufficient cause to the contrary appear," is illegal and void, though the party, not understanding the effect of the provisional decree, marry, believing he is at liberty to contract another marriage.<sup>41</sup> So, a limited divorce, or one from bed and board, does not dissolve the marriage relation and make the parties free to marry again.<sup>42</sup>

**11.** A person, to be competent to marry, must be **sane** and under no mental disability, else the marriage is void. A **lunatic** may not enter into a marriage state, any more than he may enter into any other contract; nor a fool, nor a person not of sound mind; if he do, the marriage is absolutely void.<sup>43</sup>

The necessary capacity of mind to enable persons to marry was, formerly, that fixed as the standard in ordinary

<sup>39</sup> 4 Brew. (Pa.) 305 (1867).

<sup>40</sup> 10 Phila. 131 (1874); Pa. P. L., 1815, p. 150.

<sup>41</sup> 121 Mass. 232 (1876).

<sup>42</sup> 21 How. (U. S.) 582 (1858); see *The Law of Divorce*.

<sup>43</sup> 12 Mass. 363 (1815).

contracts, that is, that degree of understanding which conveys a knowledge of the act and its consequences, or such a degree of mental ability as equips a person to manage his own affairs. The present test is whether the alleged insane person possessed sufficient mental capacity to have understood, in a reasonable manner, the nature and effect of the marriage contract;<sup>44</sup> whether he acted rationally regarding marriage and the particular one in dispute.<sup>45</sup>

In a marriage case, insanity is a want of capacity which must exist at the time of the marriage. The development of it afterwards is not sufficient reason itself to declare a marriage void.<sup>46</sup> It is a principle of the law, however, that a lunatic who has been married while in a state of lunacy, or insane, may, on regaining his reason, affirm the marriage, and this without any new solemnization.<sup>47</sup>

**12. Drunkenness**, or intoxication, is not regarded as sufficient to render a party incapable of entering into a marriage contract; but if the drunken condition of a party be such as to render him oblivious of his act, or have caused complete unconsciousness, or madness, the marriage is void.<sup>48</sup>

**Deaf-and-dumb persons**, not being idiots in law, are mentally competent to marry; and so are persons afflicted with total blindness.<sup>49</sup> **Impotence**, or want of sexual capacity, is made an impediment to marriage, or cause for divorce, by statutes in most states. The want of sexual capacity need exist in only one of the parties to create cause for declaring a marriage void from the beginning; but impotence is sometimes difficult of proof, and it must be established so as to show that the party complaining is not fabricating, otherwise it will not have the weight sufficient to nullify a marriage.<sup>50</sup>

**13. Consanguinity and Affinity.**—Persons related 'too closely by blood or marriage, or within certain prescribed

<sup>44</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 19, p. 1,162, citing 171 Ill. 33 (1898).

<sup>48</sup> 22 N. J. Eq. 91 (1871).

<sup>49</sup> 1 Kay & J. (Eng.) 4 (1854).

<sup>45</sup> Bish. Mar. & D., Sec. 600.

<sup>50</sup> 55 Me. 21 (1867); 33 Md. 401 (1870); 25 N. H. 267 (1852).

<sup>46</sup> 66 Ill. 87 (1872).

<sup>47</sup> 4 Sneed (Tenn.) 57 (1856); 4 Johns. Ch. (N. Y.) 333 (1820).

degrees of consanguinity (relationship by blood), or affinity (relationship by marriage), are not competent to contract a marriage, and the statutes of most jurisdictions declare marriages void which are contracted by such persons.

Formerly, at common law, there were two kinds of disabilities affecting the validity of the marriage relation. The first were termed canonical, depending on the law of the church and enforced in the ecclesiastical court. Among these were consanguinity and affinity. These causes rendered marriage voidable only, and it was necessary that the nullity should be declared during the lifetime of the parties, otherwise they were, and continued, married for all civil purposes. The second kind were civil disabilities, such as a prior marriage, infancy, idiocy, lunacy, fraud, or force. These made the contract void from the beginning, and the union meretricious. In such cases, no sentence of nullity or decree of divorce was required, but at all times, whether during the lifetime of the parties or afterwards, the marriage might be considered and treated as null and void.<sup>51</sup>

Consanguinity and affinity within the prohibited degrees are civil disabilities by force of express statute, and make the marriage null and void without decree of divorce, except as otherwise provided. That this is so whenever a marriage is declared null and void by the express provision of some statute is abundantly clear from the text-writers and cases. Thus, a failure to comply with the provisions of the English Marriage Acts was always held to avoid the marriage absolutely and from the beginning.<sup>52</sup> The degrees of consanguinity and affinity are computed in the same way. In most jurisdictions, statutes express these degrees; in some states, it is declared that the marriage of persons related within the degrees named shall be void absolutely; in others, no provision of this kind is made. The limit of consanguinity is generally, though not always, that of first cousins.

The prohibited degrees are as follows:

<sup>51</sup> 70 Pa. 393 (1872); 1 Black. Comm. 434, 435; 2 Kent's Comm. 95.

<sup>52</sup> 70 Pa. 394 (1872).



## DEGREES OF CONSANGUINITY

A man may not marry his	{	mother
		father's sister
		mother's sister
		sister
		daughter
		daughter of his son or daughter
A woman may not marry her	{	father
		father's brother
		mother's brother
		brother
		son
		son of her son or daughter

## DEGREES OF AFFINITY

A man may not marry his	{	father's wife
		son's wife
		son's daughter
		wife's daughter
		daughter of his wife's son or daughter
A woman may not marry her	{	mother's husband
		daughter's husband
		husband's son
		son of her husband's son or daughter <sup>53</sup>

**14. Marriage of First Cousins.**—In Pennsylvania, a recent statute declares that from and after the first day of January, 1902, it shall be unlawful for any male person and female person, who are of kin of the degree of first cousins, to be joined in marriage, and all marriages contracted in violation of the provisions of this act are declared void.<sup>54</sup> Arkansas has a similar statute.

<sup>53</sup> Pa. P. L., 1860, p. 393, and statutes of other states.

<sup>54</sup> Pa. P. L., 1901, p. 597.

**15. Half-Blood Relationship.**—Under the statutes defining incest, it has been held that the relationship of brother and sister includes brother and sister of the half-blood, and the same rule has been applied to uncles and nieces of the half-blood.<sup>55</sup> In England, the prohibition extends to persons related by the half-blood as well as to cases where the relationship is by whole blood, so that it has been held that it is incestuous for a man to marry the daughter of the half-sister of his deceased wife.<sup>56</sup>

**16. Intermarriage of Races.**—In the United States, statutes in some states prohibit the intermarriage of whites with negroes or mulattoes, declaring such marriages void and making them criminal offenses. Usually, such marriages cannot be evaded by marriage in a state or country where the parties have no domicile. Under a statute declaring that "marriage cannot be contracted between a white person and a negro, mulatto, or person of mixed blood to the third generation, inclusive," the marriage of a white person and a negro of mixed blood of the third generation is void.<sup>57</sup>

The intermarriage of a white person to an Indian is valid if in conformity to the law of the place or to the customs of the Indian tribe, unless such marriage be prohibited by statute.<sup>58</sup>

#### PROOF OF MARRIAGE

**17.** It is frequently necessary to prove the fact of marriage. This may be done, where an actual ceremony has been performed, by the witnesses to its solemnization, or from a record, or a marriage certificate. A marriage *de facto*, or reputed marriage, is sufficient to charge the husband with the wife's necessities, and in all civil cases involving the right of property, the fact of marriage may be proved by long-continued cohabitation as man and wife.<sup>59</sup>

<sup>55</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, p. 137, citing 49 Am. St. Rep. 926 (1895); 44 Kans. 190 (1890).

<sup>56</sup> *Ibid.*, Vol. 19, p. 1,175, citing 1 B. & S. (Eng.) 447 (1861).

<sup>57</sup> *Ibid.*, p. 1,172, citing 65 Am. Dec. 738 (1890); 34 Me. 77 (1852); 23 N. C. 378 (1841); 9 Humph. (Tenn.) 74 (1848); 2 Tenn. Ch. 216 (1875).

<sup>58</sup> *Ibid.*, p. 1,173, citing 12 Tex. Civ. App. 223 (1896); 40 Am. St. Rep. 886 (1894).

<sup>59</sup> 25 Pa. 326 (1855).

It may also be proved by other circumstances, as where the wife has indorsed checks in her married name; where a policy of insurance has been taken out by the alleged husband for her, in which she is described as his wife; where she collected moneys from beneficial societies of which he was a member, which she could only do as a wife, and where she had a deed made to her in her married name; also, where the marriage was a matter of general repute, as where it appeared in the circle in which she lived that she was known as and called a particular man's wife.<sup>60</sup>

The fact that persons are holding themselves out as husband and wife is sufficient proof of marriage for the purposes of administration.<sup>61</sup> Marriage may also be proved by the declarations or admissions of the parties to it, when against their interest, or by conduct from which such admissions may be implied.<sup>62</sup>

#### NATURE OF THE RELATION

**18. Scope of the Subject.**—In order to treat this subject so as to assist the faculty of comprehension, it is necessary to give a summary of the rights, duties, and disabilities of husband and wife under the common law, directing our inquiry particularly to the statutory modifications, and, where it exists, the complete abrogation of the common-law doctrine. No more than a superficial resumé of the statutory enactments will be attempted, because in the constantly changing and disjointed state of the various enactments, the task must at best be imperfectly performed. So much, however, will be attempted as is thought sufficient to convey a clear understanding of the principles which at present govern the marriage relation, and the injunction is laid to the student to closely apply himself to the statutes of the various jurisdictions for additional information.

**19. Coverture Under Common Law.**—By marriage, at common law, husband and wife were constituted one person, the legal existence of the wife being incorporated

<sup>60</sup> 168 Pa. 561 (1895).

<sup>61</sup> 2 Redf. (N. Y.) 456 (1877).

<sup>62</sup> 49 N. J. Eq. 530 (1892).

or merged into that of the husband, under whose protection and cover she lived and acted. Hence, there originated the terms *feme covert* as applied to a married woman, *coverture*, as applied to her condition, and *baron* and *feme* to designate a husband and wife relatively. They were incapable of contracting or entering into covenants with each other, or of suing one another, the disabilities being based on the assumption that a gift or grant by one to the other, or an action at law between them, would serve to presume a separate existence in each, thus obliterating the fiction of unity which was the chief principle of the common-law doctrine; but a husband could bequeath property to his wife by will, and she might acquire property from him, during their joint lives, through the medium of a trustee. The wife's existence being merged in that of her husband, the latter by the marriage acquired all her property and fortune. She had not ownership even of her separate earnings, nor could she dispose of her personal property by will, except under a marriage settlement, or by her husband's consent, and only by her husband's consent could she contract with a third party. She was, however, separately considered in most matters of liability, as to which the husband had no immunity.

The disability of a wife at common law was complete. Not only could she not sue without the consent or joinder of her husband, but her right to action, if exercised, inured of her husband's benefit by his reducing the chose in action into possession, and thus vesting it in him absolutely. The husband, on the contrary, was all powerful, but the inequality of the mutual situation was somewhat equalized by the law's requirement of him to support and protect his wife and to pay debts which she contracted. He had the right to chastise or correct her in a moderate way, being responsible if he ever overstepped the bounds of propriety by inflicting excessive punishment. He was the sovereign head of the family—a right which is still guaranteed as a mark of dignity under the procedure of the modern law—and as such could command obedience, honor, and love in return for his



protection, love, and support of his wife. Mutually, husband and wife took under the old law certain interests in one another's real estate, as the right of curtesy and dower, depending on the respective survivorship of either. These rights remain under the new law with certain modifications.

**20.** In England, previous to the year 1870, except as modified by the rulings of the court of chancery, all the personal property of the wife of a domiciled Englishman, acquired during coverture, belonged absolutely to the husband, subject to the exemption that property in the nature of a debt owed to the wife could be collected by the husband to his own use, but, in default thereof, the debt would again become payable to the wife, if she survived her husband. All the wife's personalty became the husband's so absolutely that it descended to his representatives as part of his estate. Leasehold estate belonging to the wife became the husband's, to do with it as he pleased while he lived, but he could not dispose of it by will, and whatever remained of such leasehold estate, undisposed of at her husband's death, became her property again, if she survived her husband.

The real estate of a married woman, in England, became the husband's to enjoy so far as the rents and profits, yielded by it, were concerned, and this continued during the husband's life, if children were born of the marriage who could have inherited, and if the husband survived his wife; but the husband could not dispose of the wife's real estate either by an act between living persons or by his will, although his interest existing in it was his own, to do as he pleased with it. The wife could not dispose of the real estate during her life without his consent, but she regained possession of the property after the husband's death, free from any debt of the husband's, and at her death it descended to her heirs.

**21. Modifications by Equity Rulings.**—By the doctrine of equity, the stringent rules of the common law were greatly modified and restricted. There was invented by chancery "the separate use of a married woman," by which

the court provided that whenever it was necessary, and so far as it was necessary to give effect to that separate use of a married woman, the husband should be made trustee of whatever property came to him in his marital right which ought to be so held. The legal right was not interfered with, but the husband was made trustee for his wife.<sup>63</sup>

The courts of equity enforced an antenuptial contract, which under the common law was treated as dissolved by marriage, because of the unity doctrine, and they further permitted a married woman to own whatever property appeared to have been granted to her with the intention on the donor's part that it should be free from the husband's control, such as wedding gifts and jewels and like property, the use of which distinctly pertains to a wife; and similar action was taken with respect to any other gift to the wife (except money) by a third person, during coverture, as of anything which might form part of a wife's paraphernalia, such as apparel or ornaments which a wife could claim, subject to the claim of his creditors, upon her husband's death; and it was permitted that the husband could give the wife articles of paraphernalia to use, but they were his to do with as he pleased, save that he could not dispose of them by will.

Other strides made in equity, in behalf of married women, were permission to earn a separate property by carrying on a trade, with her husband's permission, and she might, as an incident of her separate property, dispose of it by will, her will at common law being a nullity; but the permission was definitely restricted to what was actually separate property while the marriage existed.

At common law, a married woman in England could not contract except as her husband's agent, and except that, according to the custom of London, if she were carrying on a separate trade, she might contract as if she were a single woman, or if her husband were an alien who had never been in England, or if he were undergoing a sentence of transportation or penal servitude.<sup>64</sup>

<sup>63</sup> 5 Ch. Div. (Eng.) 923 (1877).

<sup>64</sup> 99 U. S. 330 (1878).

**22. Statutory Changes in England.**—By the English Married Woman's Property Act of 1870, supplemented by the amendatory act of 1874, in both of which Scotland is excepted, the status of a married woman in England was affected much to her advantage.<sup>65</sup>

By the act of 1870, a married woman's earnings, in any employment which she carried on separately from her husband, were deemed to be settled to her separate use, thus enabling the husband's acquiescence in the wife's separate employment to protect her earnings and stock in trade, not merely as against the husband and his representatives, but also against his creditors. Provision was made, also, respecting the investing of a wife's separate property, but it especially provided, as to a woman who married after the passage of the act (August 9, 1870) and who became entitled during the marriage to any personal property, as next of kin of an intestate, or to any sum of money, not exceeding two hundred pounds, under any deed or will, that such property, subject and without prejudice to the trusts of any settlement affecting the same, shall belong to such married woman for her separate use. By this act, there was also secured to the wife's separate use the rents of real property which might descend to her, and she was empowered to contract for insurance on her own life, or on the life of her husband, for her separate use, to sue in her own name in respect to her own property, and she was granted all the remedies, civil and criminal, for the protection of her separate property, that she would have if unmarried.

A woman who married after the passage of the act was made liable to the parish of her domicile for the maintenance of her husband and children, if they became chargeable to the parish, and she was, further, made liable for any debts contracted before marriage, thereby exonerating the husband, but this latter provision was amended by the act of 1874, so as to make a husband of a woman who married after the passage of the act (July 30, 1874) jointly liable with his wife for the antenuptial debts of the wife, and it limited the

<sup>65</sup> 33 & 34 Vict., c. 93 (Aug. 9, 1870); 37 & 38 Vict., c. 50.

amount of the husband's liability to the amount of property he received with his wife.<sup>66</sup>

By the wife's death in the lifetime of the husband, whatever the personalty she had to her separate use, and which she had not disposed of by will, became the husband's own, and he was, also, entitled to her leasehold estate, subject to whatever power she had to dispose of it by will, but he was required to constitute himself her legal personal representative in order to secure the leasehold estate.

**23. Present Status in England.**—Next, in the order of enabling enactments in England, came the Married Woman's Property Act of 1882, which became effective on January 1, 1883, and repealed the acts of 1870 and 1874, but disturbed neither the rights nor the liabilities that had accrued before its operation. By its provisions, it empowers a married woman as if she were a *feme sole* (a single woman) as to her separate property. The husband is deprived of all interest in any property acquired by the wife after January 1, 1883, except her earnings from a trade carried on jointly with him, in which she does not "exercise any literary, artistic, or scientific skill."<sup>67</sup> The husband is relegated to liability for his wife's antenuptial debts, and for wrongs committed by her before marriage, and the mere act of marriage gives him no interest, during the marriage, in any of the wife's property which was her own at the time of the marriage, or which she afterwards acquires, except their joint earnings; but the act does not disturb any right to a wife's property after her death, that he had before the operation of the act.

The capacity of a married woman was greatly enlarged by the act of 1882. She was declared "capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of a trustee," and the only limit to her acquiring property seems to be that, by implication from one of the

<sup>66</sup> 37 & 38 Vict., c. 50.

<sup>67</sup> 45 & 46 Vict., c. 75 (Aug. 18, 1882).



sections, her earnings in a trade carried on by her apart from her husband would not become her separate property, in the absence of agreement with her husband;<sup>68</sup> but, as we have seen, this exception does not apply to earnings acquired by the exercise of literary, artistic, or scientific skill on the wife's part.

24. A married woman's capacity to contract exists, under this act, it is claimed, even though she has no separate property; and it has been further claimed, the act being silent about the qualification of age, that she has the power to contract, even if she be an infant, but this power exists only during her life and does not extend to the disposition of her property by will, since by the English Wills Act, the will of an infant is invalid. In support, however, of the capacity of a married woman, who is, in law, an infant, to contract, it is urged that "there is not in the nature of things, any reason why a woman who is capable of contracting a marriage would not be equally capable of entering into any other contract."<sup>69</sup> The act of 1882 distinctly provides that "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*," and her husband need not be joined with her in any legal proceeding instituted by or against her.<sup>70</sup>

25. Under other legislation in England, a husband is enabled to convey to his wife a freehold hereditament or a thing in action,<sup>71</sup> and, by the act of 1882, a wife being capable of acquiring property as if she were a *feme sole*, the husband is capable of transferring property to her as if she were not married to him. This power has been sustained by the court in some exceptional cases, and denied in others,

<sup>68</sup> Eng. M. W. Prop. Act, 1882, Sec. 1, Subsec. 1.

<sup>70</sup> Eng. M. W. Prop. Act, 1882, Sec. 1, Subsec. 2.

<sup>69</sup> White & Blackburn, Eng. M. W. Prop. Act, 1882, p. 32.

<sup>71</sup> Conveyancing Act, 1881, Sec. 50.

the doctrine of unity being still adhered to, leaving the power of husband and wife to contract with each other somewhat in the dark; but there appears to be no limit to a wife's disposing of her property, except that, as provided in one of the sections of the act, the restraint on anticipation, where it exists, is not rendered inoperative by the act, by which is meant that if a wife make a contract and a creditor sue on it and attempt to force payment out of any annuity that has become due to the wife after the date of the contract, but before the attempt to attach it has been made, the attachment will not be effective;<sup>72</sup> though generally the contract of a married woman in England, since the act of 1882, will bind not only separate property which she has at the date of the contract, but any property which she may thereafter acquire.<sup>73</sup>

**26.** Subsequent legislation in England, which, like the preceding legislation on the subject, has excepted Scotland in its application, is amendatory of the act of 1882, in that every contract entered into by a married woman, except as agent, is deemed to be with respect to and to bind her separate property, whether she be or be not in fact possessed of, or entitled to, any separate property at the time of the contract, and it binds all the separate property which she may at that time or thereafter be possessed of or entitled to, and the contract is enforceable by process of law against all property which she may thereafter, while discover (unmarried), be possessed of, or entitled to, except that a liability or obligation arising out of such contract cannot be satisfied out of any separate property which at the time of the contract, or thereafter, she is restrained from anticipating.<sup>74</sup> By this act, a married woman's capacity to dispose of property by will was more clearly defined. Before the act of 1893, the extent to which she could make a disposition by will was the subject of much confusing judicial injury.<sup>75</sup>

<sup>72</sup> 6 Ch. Div. (Eng.) 96, 144 (1877); 1 Q. B. Div. (Eng.) 436 (1876); Eng. M. W. Prop. Act, 1882, Sec. 19.

<sup>74</sup> Eng. M. W. Prop. Act, 1893, 56 & 57 Vict., c. 63.

<sup>75</sup> *Ibid.*, Sec. 3.

<sup>73</sup> 17 Ch. Div. (Eng.) 445 (1881); Eng. M. W. Prop. Act, 1882, Sec. 4.

At common law, and before the Wills Act, the will of a married woman in England was 'a mere nullity; whether she attempted to dispose of realty or personalty, her will was equally invalid, because in the law's regard a wife had no existence separate from her husband. This restraint was subsequently modified in so far as to permit a married woman, if she were an executrix, to make a will appointing an executor to continue the representation of the original testator, and by the consent of her husband she was permitted to make a will; and she might dispose of her separate estate or its savings, by will."<sup>6</sup>

27. The enactment of the English Wills Act was intended to make a married woman capable of making a will, but it was held to give no testamentary capacity in a case where a married woman had executed a will, without her husband's consent, and it was decided that the wife's will would not pass property which had come to her under her husband's will, notwithstanding the Wills Act enacted that every will shall be construed with reference to the real and personal estate comprised in it to take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will."<sup>7</sup> A married woman's will, under this act, had only the benefit of new rules of interpretation, but it was soon ascertained that she was as incapable as before of passing by her will, made during coverture, anything that was not separate property; and, by such will, if she outlived her husband, property acquired after his death did not pass, unless she reexecuted the will after his death, and in effect made a new will."<sup>8</sup>

The wording of the act of 1882, which we have stated empowers a married woman to dispose by will of "any real or personal property as her separate property, in the same manner as if she were a *feme sole*," was thought to be explicit enough to repair the faults in a wife's capacity in this behalf; but evidently the act of 1882 did not come up to expectations,

<sup>6</sup> L. R. 7 H. L. (Eng.) 580 (1875); L. R. 8      <sup>7</sup> 1 D. J. & S. (Eng.) 63 (1862); 1 Sw. & Ch. (Eng.) 778 (1873).      Tr. (Eng.) 125 (1858).

<sup>8</sup> 71 Vict. (1873), c. 26, Sec. 24; L. R. 7 H. L. (Eng.) 580-590 (1875).

as a question of importance arose regarding the scope of the phrase "separate property," which has created considerable confusion in the attempts to determine the exact meaning of it.<sup>79</sup> Hence, in the Married Woman's Property Act of 1893, there was incorporated a section declaring that section 24 of the Wills Act of 1837 shall apply to the will of a married woman made during coverture, whether she is or is not possessed of, or entitled to, any separate property at the time of making it, and such will shall not be required to be executed or republished after the death of the husband.<sup>80</sup>

## 28. Capacity Under Statutes in the United States.

While England was foremost in establishing the marital independence of married women by equitable principles, as pronounced by its high court of chancery, the United States took the lead in statutory enactments in their behalf and the judicial construction thereof, which at first tending, with measured hesitancy, toward giving them some of the rights of property denied to them under the old procedure, have resulted in placing them on a footing very nearly equal to that of their husbands. The statutes of some of the states do not fully enable married women to act independently of their husbands, in matters of property and contract, while the statutes of other states have almost entirely abrogated the disabilities of married women in these respects. In most all the states, principally in those where the most liberal statutes exist, the disability to become an accommodation indorser or guarantor or surety for another is expressly continued. But this may be a blessing in disguise. The mutual relations of husband and wife, in the matters of tenancy by the curtesy and dower, have not been disturbed by any of the enabling legislation and remain unimpaired; except that tenancy by the curtesy has been modified or abrogated by statute in some states.

29. The states of Massachusetts and Maine are credited with the first steps in behalf of married women. By an

<sup>79</sup> L. R. 8 Ch. 778 (1878); L. R. 7 H. L. 580 (1875).

<sup>80</sup> Eng. M. W. Prop. Act, 1893, Sec. 3.



enactment in Maine, in the year 1821, a married woman was empowered, in the event of desertion by the husband, to sue, to contract, and to convey real estate as if she were unmarried. Massachusetts had enacted a similar law a short time previous to the Maine enactment, but differing, to some extent, in the powers conferred. Very soon thereafter occurred a hegira from the old regime, in which married women were ruled to their disadvantage, to a new sphere of enlarged capability, in which the old fiction of unity of husband and wife in property matters appears as a mere reminiscence, and a wife now enjoys powers almost equal to that of her spouse.

30. In the year 1848 were enacted the first important statutes in behalf of married women, when the legislatures of Pennsylvania and New York made laws securing certain rights to them. Certain states had previously given the right to married women to fully dispose of their property by will, notably Connecticut, Illinois, Pennsylvania, Michigan, and Ohio; and Indiana and Missouri had passed statutes exempting a wife's property from liability for her husband's debts. The first married women's act of Pennsylvania, passed April 11, 1848, provided that property of any kind owned by a single woman "shall continue to be" her property "as fully after her marriage as before"; and all property, "which shall accrue to any married woman during coverture, by will, descent, deed of conveyance or otherwise, shall be owned, used, and enjoyed" by her as her own property.<sup>81</sup> Thus, by the act of 1848, a husband's right to reduce his wife's chose in action into possession was taken away.<sup>82</sup>

The act of 1848 further provides, that property whether owned by a married woman before marriage, "or which shall accrue to her afterwards, shall not be subject to levy and execution" for her husband's debts and liabilities, or subject to sale or encumbrance by the husband, without her written consent. This statute expressly provides

<sup>81</sup> Pa. P. L., 1848, Sec. 6, p. 536.

<sup>82</sup> 20 Pa. Co. Ct. 387 (1897).

that the husband shall not be liable for the wife's debts contracted before marriage, and that her property is not to be exempt from liability for debts contracted by herself, or in her own name, by any person for her, or from execution on any judgment obtained against her husband for the torts of the wife, in which cases execution shall first be had against the wife's property. The power to dispose by will of her separate property, which has accrued before or during coverture, is an additional provision of this act, and her property is made liable for the necessities of life of the family, in default of property of the husband which could be levied on therefor. Other sections of the act provide, (1) for placing children on a footing with the husband, in inheriting the personal property of a wife who dies intestate; (2) that the real estate of such married woman, upon her decease, shall be distributed as provided by the intestate laws of the state; and (3) that the Wills Act of 1833 shall not be construed to deprive the widow of her choice either to take a bequest or devise under her deceased husband's will, or his share of the personal property under the intestate laws of the state.<sup>83</sup>

**31.** The status of married women was wholly changed, and all disabilities in the way of asserting their rights were swept away, by the later enactments in Pennsylvania of 1887 and 1893. The act of 1887 declares that marriage shall not be held to impose any disability on a married woman as to the acquisition, use, or disposition of property of any kind, in any trade or business in which she may engage, or for necessities, or for the use, enjoyment, and improvement of her separate estate, or her right and power to make contracts of any kind, but that every married woman shall have the same right to acquire, use, or dispose of her property, in possession or expectancy, in the same manner as if she were a *feme sole*, and with all the rights and liabilities incident thereto, as if she were not married, the power to become an accommodation indorser, guarantor, or surety

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<sup>83</sup> Pa. P. L., 1848, Secs. 7-11, p. 537.

being, however, withheld, and the joinder of the husband in mortgages and conveyances of real estate being still required; and a married woman's capability is asserted, to enter into any contract, and to sue and be sued upon such contract, either for torts done to or committed by her, in all respects as if she were a *feme sole* without the joinder of her husband with her, as plaintiff or defendant. The act further gives husband and wife the same remedies upon contracts in their own name and right against all persons for the protection and recovery of their separate property as unmarried persons enjoy.<sup>84</sup>

**32.** The Pennsylvania act of 1893 is substantially a reenactment of the act of 1887, of all that is material to the advancement of a married woman, and she is no longer a *feme covert* in the technical sense of the term, nor in the sense understood in the old common-law days.<sup>85</sup> It enacts that (1) "Hereafter a married woman shall have the same right and power as an unmarried person to acquire, own, possess, control, use, lease, sell, or otherwise dispose of any property of any kind, real, personal or mixed, and either in possession or expectancy, and may exercise the said right and power in the same manner and to the same extent as an unmarried person, but she may not mortgage or convey her real property, unless her husband join in such mortgage or conveyance; (2) a married woman may, in the same manner and to the same extent as an unmarried person, make any contract in writing or otherwise, which is necessary, appropriate, convenient or advantageous to the exercise or enjoyment of the rights and powers granted by the foregoing section, but she may not become accommodation indorser, maker, guarantor or surety for another." The third section of the act qualifies her to sue and be sued civilly in all respects, and in any form of action and with the same effect, results, and consequences, as an unmarried woman.<sup>86</sup>

<sup>84</sup> 132 Pa. 503 (1890); 20 Pa. Co. Ct. 387 (1897); Pa. P. L., 1887, p. 333; Pa. P. L., 1893, p. 344.

<sup>85</sup> 20 Pa. Co. Ct. 387 (1897).

<sup>86</sup> Pa. P. L., 1893, p. 344.

Within the meaning of the acts of 1848, 1887, and 1893, all the property of a married woman which is held on a separate use trust for her benefit is her separate estate, and under those acts whatever belongs to the wife in her own right is her own property absolutely. By *property*, by the act of 1893, is meant property of any kind, real, personal, or mixed, whether in possession or expectancy.<sup>87</sup>

**33.** The courts of Pennsylvania have held that a married woman is not now disqualified by reason of her coverture from being one of five incorporators in a proposed corporation, and that her power to make a contract as a subscriber to the capital stock of a corporation is not within the exceptions stated in the act. She may lawfully confess a judgment, and she has, in fact, all the contractual powers, but those excepted in the act—that which forbids her from becoming an accommodation indorser, guarantor, or surety for another, but which does not prevent her from mortgaging her real estate as security for her husband's debt—and the exception that she may not execute or acknowledge a deed or other instrument conveying or mortgaging her real property unless her husband join therein; but with respect to every other part of the contract or conveyance she is as an unmarried person.<sup>88</sup>

It has even been adjudicated that, by the act of 1893, which repeals all other acts inconsistent therewith (and especially the act of 1887, which it reenacts in substance), there is no longer occasion to take the separate acknowledgment of a married woman to a deed of conveyance.<sup>89</sup> Perhaps the learned judge, who announced this opinion, was a little ahead of other advocates of woman's advancement, but he employed sound logic in his deduction, and his views subsequently bore fruit in the passage of an act. Reviewing the modern legislation in behalf of married women, he said: "I am of opinion that the separate acknowledgment (of a deed) is no longer necessary in any event. It will be

<sup>87</sup> 19 Pa. Co. Ct. 485 (1894).

<sup>88</sup> 14 Pa. Co. Ct. 511, 512 (1894).

<sup>89</sup> 18 Pa. Co. Ct. 492 (1893); 132 Pa. 503 (1890); 17 Pa. Co. Ct. 635 (1895).



conceded that it cannot be necessary in her executory contract, if not required in her deed. That, under all former acts, a separate acknowledgment of the wife was essential to give validity to her deed, is nothing to the point; for which one of these prior acts gave her the right to sell, and the power to 'exercise the right, in the same manner, and to the same extent as an unmarried person?' Were the act of 1893 the first and only statute, defining the right and powers of married women, who could ever derive from its terms, the necessity for a separate acknowledgment? . . . What could be more inconsistent, with its broad and generous grant of power, than the act requiring a separate acknowledgment? . . . I rest my conclusions on this matter on the plain letter of the law; but they find abundant support on the fact that there is no longer any occasion for separate acknowledgment by the wife. The reason for the rule ceasing, the rule itself falls. Separate acknowledgment by her was made necessary under a system which fettered her freedom of action, because of her supposed weakness and dependence. That system has been displaced, because a more enlightened view has shown the theory, on which it rested, fallacious. She is now unfettered because either her supposed weakness was a fiction, or she has outgrown it."<sup>90</sup>

34. In other states, the statutes and court rulings, in some instances, are abreast with those of Pennsylvania in their regard for married women. Since the enactment of the statute of 1884, in New York, and the amendatory statute of 1892, a married woman has the same power to contract as a *feme sole*, or a man.<sup>91</sup>

Under the statute of 1874, in Massachusetts, the restriction to contract has been removed from married women, and in the broadest sense they are empowered to make contracts, oral or written, sealed and unsealed, in the same manner as if *sole*, and it is not required that the consideration of her contracts shall inure to a married woman's benefit; that is,

<sup>90</sup> 14 Pa. Co. Ct. 511, 512 (1894), by Stewart, P. J.

<sup>91</sup> 55 N. Y. Supp. 917 (1899)

she is free to contract for the benefit of her husband or other person.<sup>92</sup> In Indiana, all legal disabilities of married women to make contracts have been abrogated by statute, except that as in Pennsylvania, she must join with her husband in certain conveyances, and she cannot become accommodation indorser, guarantor, or surety for another.<sup>93</sup> In Illinois, by statute, married women are placed on the same footing as single women in respect to all property rights, including the means to acquire, protect, and dispose of the same, and all restrictions upon the power of husband and wife to contract with each other, except as to compensation for services, are removed; and, by statute, ample power is conferred on a married woman to contract with a person other than her husband, to enter his service and work for him, the husband not objecting.<sup>94</sup>

"In nearly all the states," says an authority, "the common-law rules giving the husband an ownership or interest in his wife's property have been abrogated; the wife is clothed with a full legal estate in and the right to all the property, real or personal, which she has at the time of the marriage, or which she may acquire by inheritance, by will, conveyance, grant, or gift, during its continuance; and she has generally the entire power of its management or disposition, as though she were unmarried." These are the prevailing types of statutes, but, in some of the states, the husband must join in a deed or mortgage of her land, and in a few he is still entitled to its possession.<sup>95</sup>

<sup>92</sup> 124 Mass. 109 (1878).

<sup>93</sup> 125 Ind. 254 (1890); Ind. Rev. Stats., 1881, Sec. 5,115.

<sup>94</sup> 132 Ill. 443 (1890); 106 Ill. 36 (1883); 109 Ill. 531 (1884).

<sup>95</sup> 1 Pom. Eq. Jur. (1892 Ed.), Sec. 79.

## TENANCY BY THE ENTIRETY

**35. Definition and Nature.**—A tenancy by the entirety, or by entireties, arises whenever an estate vests in two persons, who are at the time the estate vests, husband and wife. It may exist in personal as well as real property, in choses in action as well as in choses in possession.

Words, which in a conveyance to unmarried persons constitute a joint tenancy, will create, if the grantees be husband and wife, a tenancy by entireties.<sup>1</sup> The marked difference between the two is: In a joint tenancy either tenant may convey his share to a cotenant, while neither tenant by the entirety can convey his or her interest so as to affect their joint use of the property during their joint lives, or to defeat the right of survivorship upon the death of either of the cotenants. There may be partition between joint tenants, but not between tenants by entireties.<sup>2</sup> It is well, in this connection, to recall the difference between a joint tenancy and a tenancy in common. In a joint tenancy there must be the unities of interest, title, time, and possession.<sup>3</sup> A tenancy in common possesses only one of these—unity of possession. As to his own individual share, a tenant in common is precisely in the position of the owner of an entire and separate estate.<sup>4</sup>

At common law, as viewed by the old commentators, a tenancy by the entirety is more definitively described as an *estate in land* given to the husband or wife, or a joint purchase of land by both, during coverture, which they do not hold as joint tenants, nor as tenants in common,\* for, being one person in law, they cannot take by moieties (halves or portions). Both are seized of the entirety (whole),

<sup>1</sup> 156 Pa. 628 (1893); 53 Ind. 64 (1876); 65 Pa. 395 (1870).

<sup>2</sup> 37 Ind. 391 (1871).

<sup>3</sup> See *The Law of Property: How a Joint Tenancy Is Constituted, How Tenancy in Common Is Created.*

<sup>4</sup> Wms. Real Pr. (6th Am. Ed.) 136.

neither can sell without the assent of the other, and the survivor takes the whole, the husband being entitled to receive the rents during coverture. The estate may exist not only in fee simple but in an estate for life or for years.\*

This species of tenancy grew out of the common-law fiction of the unity of husband and wife, and the former incapacity of a married woman to hold a separate and severable estate in lands under a joint conveyance to both husband and wife. Its leading characteristic is the inseverable quality, which distinguishes it from a joint tenancy and a tenancy in common, as we have shown. Neither spouse can by his or her own act cause a severance of the estate, and there can be no partition of the lands during their joint lives.<sup>6</sup> The claim made in our definition, that the estate "may exist in personal as well as in real property," is based mainly on its inseverability. For example, the estate, being originally one of real property, if either husband or wife die while the estate exists as real property and remains as such to them, not having been alienated by the joint act of both, the survivor would hold it against any claim of the heirs or creditors of the decedent, and no valid reason appears for applying a different rule to proceeds of a sale of the property made by the spouses privately, by which sale the character of the property is changed from real to personal property.<sup>7</sup>

**36. Creation of the Estate.**—Estates by entirety may be created by will, by instrument of gift or purchase, and even by inheritance. Such an estate may be created originally in personalty; as where a child died intestate and without issue, her estate, which was personalty, vested in her father and mother, jointly and absolutely, and the father and mother held by the entirety, and not as ordinary tenants.<sup>8</sup> When personal property, such as bank stock, is left by will to persons who are husband and wife, there is created an estate by entirety, and the husband will be entitled to

<sup>5</sup> 2 Black. Comm. 182; 2 Kent's Comm. 132; 5 T. R. (Eng.) 652 (1794); 2 Ch. Div. (Eng.) 233 (1893).

<sup>6</sup> 64 Pa. 39 (1870); 144 N. Y. 312 (1895); 2 Vern. (Eng.) 120 (1690).

<sup>7</sup> 156 Pa. 633 (1893); 53 Ind. 64 (1876).

<sup>8</sup> 135 Ind. 181 (1893); 65 Pa. 395 (1870).



the dividends on the stock during the joint lives of husband and wife, the whole going to the survivor.<sup>9</sup>

**37. Right of Survivorship.**—The common-law doctrine, before stated, gives the husband the right of control during his life over real estate of which both husband and wife are seised of the entirety. Neither he nor she can defeat the right of survivorship as to land thus held by both, by conveying it without the consent of the other, but the whole must remain to the survivor. Although the husband cannot alienate it without his wife's consent, he has such absolute control of it that he may encumber it with his debts. Yet, if the wife survive him, she takes the property discharged of his debts, for the reason that she does not take it under or through him, but by virtue of the paramount grant in the original conveyance. And, although the husband's interest may be sold under execution during coverture, yet, if the creditors levy upon the estate in his lifetime, and sell it as his property, the wife may recover it on his death in an action of ejectment.<sup>10</sup>

The right of survivorship extends to choses in action and other personalty, but the authorities differ regarding the application, some conferring the doctrine only to personalty that is not reduced to possession, and others applying it to personalty in possession as well. To reduce property to possession in a legal sense, the husband must do some act indicating an appropriation of it to his own use, or disaffirm the right of his wife. Certain shares of bank stock were devised to husband and wife, "and to the survivor of them, . . . to have and hold the same forever," the certificate being issued by the bank in the names of both and left by the husband in the possession of the wife, which, however, gave her no additional rights. The husband undertook to sell the shares, but the bank refused to make the transfer until the certificate was delivered to it, which the wife refused to do. On bill in equity filed to compel the delivery of the certificate, it was held that the prospective

<sup>9</sup> 159 Mass. 415 (1893).

<sup>10</sup> 56 Pa. 286 (1867); 159 Mass. 415 (1893); 5 Watts (Pa.) 181 (1836); 16 Vt. 309 (1844).

purchaser was not entitled to have the certificate delivered to him, but that he was entitled to the dividends during the joint lives of the husband and wife and to the shares in case the husband survived his wife, but, if the wife survived the husband, she was entitled to the shares absolutely.<sup>11</sup>

**38. Effect of Legislation.**—In some jurisdictions, it is held that the legislation which secures to the wife the enjoyment of her separate estate is destructive of the legal unity of husband and wife on which tenancies by entireties depend; but, in Pennsylvania, the courts hold the better view to be, that such tenancies are not destroyed or impaired by this legislation. From the various decisions, the deduction may be made that the tenancy by the entirety exists in most of the United States under the common-law rule, and that in England, and in the few jurisdictions in this country where modifications are claimed to have been effected by the legislation in behalf of married women, the utmost that has been done to this kind of estate, in states where the common-law rule is modified, is to give it the effect of a joint tenancy or tenancy in common in the use of the property; or, as decided in some states, by proper words of limitation in the conveyance, to make husband and wife joint tenants or tenants in common of an estate which, without such words, would be an estate by the entirety with all the incidents which pertain thereto. In one or two states it is declared that the common-law rule is practically abrogated.<sup>12</sup>

**39. Effects of Divorce on the Estate.**—In England, when husband and wife are tenants by entireties, a decree absolute for dissolution of the marriage makes them joint tenants, and the former wife is entitled to an account of rents and profits as from the date of the decree. By divorce they cease to be husband and wife, they cease to be one person, and the husband's right to receive the rents, which

<sup>11</sup> 53 Ind. 64 (1876); 65 Pa. 395 (1870); 33 Me. 38 (1851).

<sup>12</sup> 36 Ala. 728 (1860); 76 Ill. 57 (1875); 56 N. H. 105 (1875); 28 Iowa 302 (1869); 56 Pa. 106 (1867); 144 N. Y. 313 (1895); 104 Ind. 598 (1885); 2 Ch. Div. (Eng.) 229 (1893).

existed during coverture, is ended.<sup>13</sup> In the United States, in the few jurisdictions in which the question has reached the courts, the opinions have diverged greatly as to the effect of divorce on estates by entirety. Under all the authorities it is far from being well settled that a divorce destroys the right of survivorship.

A few illustrations show the trend of the cases: In a case in Michigan, counsel claimed that the entirety of seisin of husband and wife in real estate, with the right of survivorship, cannot exist independent of the legal condition of unity of person on which it rests, and that a decree of divorce, which destroys the unity of person, destroys also the entirety of seisin and the right of survivorship, and that the parties become tenants in common, seized in severalty, of their respective moieties.<sup>14</sup> The supreme court reviewed the authorities cited in support of the foregoing proposition,<sup>15</sup> and put against them these propositions: "Property settled on the husband or wife, or held by third persons for the benefit of either, remains usually after the divorce the same as before";<sup>16</sup> "if there be a divorce of the wife from the husband, she is restored to a moiety of the estate during the lives of the two, with a right of survivorship upon his death."<sup>17</sup>

Supported by these views, and on the strength of a Massachusetts decision, where it was held that a divorce did not change the relative rights of husband and wife in land held in trust for both,<sup>18</sup> and on former decisions of the Michigan supreme court, it was held that an estate by the entirety, with the attendant right of survivorship, is not affected by a decree of divorce, the court saying: "We see no reason in holding that a husband or wife can, by a violation of the marital obligation, obtain an interest on land which she or he does not possess while fulfilling such obligations. The common law should not, and in our judgment

<sup>13</sup> 2 Ch. Div. (Eng.) 229 (1893).

<sup>14</sup> 85 Mich. 340 (1891).

<sup>15</sup> 4 Sneed (Tenn.) 696 (1857); 80 Ill. 197 (1875);

58 Ind. 526 (1877); 40 Kans. 442 (1888).

<sup>16</sup> Bish. Mar. & D., Sec. 717.

<sup>17</sup> 1 Washb. R. P. 425.

<sup>18</sup> 22 Pick. (Mass.) 61 (1839).

does not, permit a person thus to profit by his own gross wrong, and a violation of the most sacred obligation. With one exception, the decisions of this court are uniform that the statute has retained such grants to husband and wife as they exist at common law."<sup>19</sup>

In other states, the other view of this question has been approved and adopted, that by divorce tenants by entireties cease to be husband and wife; that the unity is destroyed and the parties are converted into tenants in common. The reasoning in a New York case is that, as an estate by the entirety is founded on marital relation and depends on the continuance of the relation for its continuance, when the unity is broken by divorce the tenancy is severed, and each takes a proportionate share of the property as a tenant in common.<sup>20</sup> In Illinois, it is held that all marital rights end by divorce; that the unities of an estate by entireties being the same as any other joint estate, differing only in one or two particulars therefrom, the same act which would convert a joint tenancy into a tenancy in common will convert an estate by entireties into a tenancy in common.<sup>21</sup> Similar views are taken in Indiana and Alabama.<sup>22</sup>

<sup>19</sup> 85 Mich. 340 (1891), by Grant, J.

<sup>20</sup> 128 N. Y. 263 (1871).

<sup>21</sup> 80 Ill. 197 (1875).

<sup>22</sup> 58 Ind. 526 (1877); 103 Ala. 488 (1894).



## COMMUNITY PROPERTY

**40. Definitions.**—Community, in French law, is a species of marital partnership which a man and a woman contract when they are lawfully married to each other.<sup>1</sup> Community property is all property acquired by the husband and wife during marriage.<sup>2</sup>

**41. Origin and History.**—The doctrine of community property in the United States obtains in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington, where it was incorporated as a system by statute, and in most of which the courts have attributed its origin to the Spanish laws. But though common to the greater number of European nations, its origin cannot be satisfactorily traced.<sup>3</sup> In the view of a Louisiana judge, “the best opinion appears to be that it took its rise with the Germans, among whom, at a very early period of their history, the wife took, by positive law, the one-third of all the gains made during coverture. It is very probable that it was the real or presumed care and industry of the wife which first produced this legislation.”<sup>4</sup> However, in Louisiana the French system of community property, known as the *dotal*, or dowry, system, was adopted so far as regards the separate property of husband and wife, but as to the common property, it retained the essential features of the Spanish system, which with some qualifications is incorporated into most of the other community-property states and is known as the American community system.<sup>5</sup>

**42. Nature, Kinds, and Qualities.**—A community is a marital partnership merely in name; it is not a partnership

<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> 5 Cal. 109 (1855).

<sup>3</sup> 17 Cal. 537 (1861); 16 Am. Dec. 212 (1827);

5 Tex. 163 (1869).

<sup>4</sup> 7 Mart. N. S. (La.) 41 (1828).

<sup>5</sup> Bouv. Law Dict., citing Ball. Com Prop., Sec. 6.

in the strictest acceptation of a partnership relation. It is rather the effect of a contract governed by rules especially intended to regulate the peculiar property relation created by law; a relation of its own kind, one that is an ideal being distinct from the persons who compose it, having its rights, its obligations, its assets, and its liabilities. In some of its elements it approaches nearer to a universal partnership than any other class of partnership relationship; it lacks the legal entity feature of a partnership or a corporation.<sup>6</sup> According to the view of a Texas court, there is, in that state, much analogy between the relations of husband and wife as to property matters and those of ordinary partners. The analogy is not complete, for the husband, save in exceptional cases, has the sole power to bind the community and is alone bound by contracts relating thereto, and the legal title to the community is generally vested in him, the wife having a mere equity.<sup>7</sup>

The community is divisible into the *legal community*, which exists by force of law, in the absence of any agreement, and the *conventional community*, which is formed and regulated by express agreement in the marriage contract, although the right to regulate, by marriage contract, the acquisition of goods and gains during marriage is recognized by the statutes in most of the community-property states.<sup>8</sup> The *legal community* forms the topic for our instruction, embodying most of the essentials of the doctrine of community property, with which the phrase *legal community* is practically synonymous.

The elemental qualities and chief intents of the doctrine of community property are: (a) The acquisition and coownership of gains by husband and wife during their married life; (b) equal division of the gains between them, or their heirs, on a dissolution of the marriage, or between the heirs of one who dies and the survivor of the dissolved

<sup>6</sup> 39 La. Ann. 416 (1887); La. Civ. Code, Art. 2,807; 3 Wash. Ter. 239 (1882).

<sup>8</sup> Codes of Cal., La., and Nev., and Rev. Stat. of Idaho and Wash.

<sup>7</sup> 87 Tex. 567 (1895).

union; (c) the exclusive management of the community property by the husband, who is its sole representative during its existence.<sup>9</sup>

**43. Formation of a Community.**—In the formation of a community, a valid marriage is the one chief fundament. A community of acquisitions and gains cannot be based on a void marriage, nor on cohabitation without marriage, nor on a so-called common-law marriage, by which persons live together as husband and wife, though not actually married.<sup>10</sup> A marriage called the *putative marriage of the civil law*, which is contracted in violation of an impediment but in good faith on the part of at least one of the parties, is recognized in Louisiana and New Mexico, and produces the civil effects of a valid marriage—a legal community of acquisitions and gains in favor of the party or parties acting in good faith. If only one of the parties have acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.<sup>11</sup>

Even after the civil law was displaced by the common law in Texas, in 1840, the community rights of a woman who married in good faith were recognized, although the marriage was void.<sup>12</sup> This recognition was based on equitable principles that recognized that the meaning of the marriage contract is that parties, by entering into it, believe they are lawfully husband and wife, and they agree, so far as they have the power, that their acquisitions shall be community property and that it is not equitable that one should have all the property acquired by the joint labors of both, to the exclusion of the other, in a jurisdiction where the community-property law induces the belief that marriage entitles each party to an equal share. Good faith is the binding link in this chain of equitable logic.

**44. What the Property Comprises.**—Community property specifically includes:

<sup>9</sup> 10 La. Ann. 303 (1855).

<sup>10</sup> 15 La. Ann. 342, 519 (1860); 44 La. Ann.

61 (1892); 2 Wash. 115 (1894).

<sup>11</sup> 40 La. Ann. 10 (1888).

<sup>12</sup> 1 Tex. Civ. App. 315 (1892).

1. *The earnings of both husband and wife*, because they are gains from the toil or talent (or both) of the spouses.<sup>13</sup> Their earnings are the produce of the reciprocal industry and labor of both husband and wife, but, in some of the community-property states, the statutes make the earnings of the wife her property in her own right, exempt from her husband's debts, and in others, the statutes provide that the earnings of the wife and her children, acquired while living apart from her husband, or where the husband has abandoned his family, shall be her separate property.<sup>14</sup>

2. *Damages for tort or injuries* to either husband or wife, the right to sue for damages being a chose in action and property within the legal sense of that term, become community property.<sup>15</sup> A cause of action resulting from injuries or wrongs to either spouse may be to the person or reputation of either, and the damages resulting therefrom belong to the community fund, and are recoverable by suit maintained by the husband.<sup>16</sup> But, a tort, or injury, inflicted upon the wife by the husband and another, where the spouses live apart, gives no cause of action to the wife against the husband. The action of damages resulting therefrom is against the other and is a separate property of the wife and not community property.<sup>17</sup>

3. *Property purchased by either husband or wife*, in the name of either, whether for cash or on the credit of either, is community property, except that property purchased with the separate funds of either would be the separate property of the one who purchased it.<sup>18</sup> So, also, property purchased by either with the funds procured by a pledge or mortgage of separate property is the separate property of the spouse who thus purchases it.<sup>19</sup>

4. *The fruits and income of the separate property*, which, in some states, is community property, includes all rents, issues, profits, increase, and revenues of the separate estate

<sup>13</sup> 35 La. Ann. 159 (1883); 27 Tex. 457 (1864); 9 Cal. 476 (1858).

<sup>14</sup> Codes of Cal. and Wash., and Stat. of Nev.

<sup>15</sup> 48 La. Ann. 1,202 (1891); 60 Tex. 331 (1883).

<sup>16</sup> 61 Tex. 633 (1884).

<sup>17</sup> 65 Tex. 281 (1886).

<sup>18</sup> 54 Tex. 16 (1880); 38 Cal. 230 (1869).

<sup>19</sup> 109 Cal. 53 (1895).



of either; also, all crops, lumber, and interest on money of either party are community property.<sup>20</sup> The foregoing is the absolute rule under the doctrine in Texas. In Louisiana, by the terms of the statute, the fruits and revenues of a wife's separate property become community property if she permit her husband to administer it and enjoy it, or if the administration of it be indifferently conducted by both.<sup>21</sup>

45. Separate property of a husband or a wife in the community-property states is defined by the statutes to be property in which each has separate rights, as distinguished from community property in which both have common and equal rights. Such separate property is distinctly property which either party brings into the marriage or acquires during the marriage by inheritance or by donation made to him or her particularly; also property acquired in exchange for other separate property. All other property acquired during the marriage by either is, as a general rule, community property.<sup>22</sup> The rule fixed by statute in some community-property states, and recognized as part of the system in others, is that the community of acquisitions and gains begins at the moment of marriage with nothing and includes, at its dissolution, presumptively everything found in the succession of the deceased spouse and in the possession of the survivor, unless it be satisfactorily proved which of such effects either of the spouses brought into marriage, or which have been given them separately, or have been inherited by them separately.<sup>23</sup>

By the terms of the Louisiana statute, the wife has the right to administer personally her paraphernal property without the assistance of her husband, and when she does so it is her separate property, otherwise it is community property. She may employ her husband to act as her agent, strictly under her instructions, and, by keeping accounts separate from his own, administer her separate estate, in which case, the fruits of her separate property

<sup>20</sup> 20 Tex. 670 (1858); 23 Tex. 25 (1859).

<sup>21</sup> 16 La. 1 (1840).

<sup>22</sup> 5 Mart. N. S. (La.) 255 (1826).

<sup>23</sup> 30 La. Ann. 276 (1878).

would be her separate property and would not fall into the community.<sup>24</sup>

The increase in value, or augmentation in weight of young animals owned by the wife at the time of the marriage is not an asset of the community, but the increase in cattle owned by the wife as her separate property is an acquisition that falls to the community.<sup>25</sup> In Arizona, California, Nevada, and Washington, the fruits and income of separate estates of husband and wife are a part of their separate estates.

Lands donated as public lands generally fall to the community under the same rules which apply to donations, gifts, or grants by individuals, but, where a grant of public lands is fixed in its character by the law under which it is made, it becomes separate or community property, just as the law provides.<sup>26</sup>

**46. Rights Under the System.**—The rule which governs in all jurisdictions under the community-property system is that the husband is the managing head and master during the marriage, and he can dispose of the community property as he pleases, the wife's joinder in the deed of conveyance of lands, even of lands the title to which is in her name, not being necessary to transfer property, except that, in some jurisdictions, her consent is requisite, as stated below.

The rule in Washington recognizes the control of the husband in the management of community property, but he cannot, in that state, convey or encumber real estate of the community unless the wife join in the deed or other instrument.<sup>27</sup> In California, Nevada, and Idaho, the husband's absolute power over the community property is restrained by statutory provisions, so that he cannot make gifts, or convey without consideration, except with the wife's consent, nor convey with an intent to defraud his wife. As to personalty, the husband's power is the same as it is over his own separate estate. In all the community-property

<sup>24</sup> 35 La. Ann. 806 (1883).

<sup>25</sup> 82 Tex. 670 (1888).

<sup>26</sup> 68 Tex. 581 (1887); 8 Wash. 1 (1894).

<sup>27</sup> 1 Hill's Code, Sec. 1,400.

states and territories, the husband is restricted from conveying the community property with fraudulent intent to the wife's injury.<sup>28</sup>

The proprietary interests of husband and wife in community property are equal in most of the states. While the husband has a controlling power of management and disposition, as complete as exclusive ownership in some of its features, the wife's interest as an owner is none the less as great as that of the husband. But, in some of the community-property states, the respective proprietary interests of husband and wife in community property are not regarded as equal by the courts, and it will require careful study of the statutes and decisions in all the jurisdictions to acquire a complete mastery of the legal status of each spouse in this respect. The accepted rule, however, and the one which most clearly defines the respective status of both husband and wife is the Louisiana one, which is based on the chief idea of community property, and is as follows: During the existence of the community the husband is head and master and he may dispose of its effects as he pleases, subject only to the right of the surviving wife upon the dissolution to proceed against his heirs for one-half of the same, provided that she can prove that the transfer or other disposition was made with a fraudulent intent to injure her. The wife has, during the marriage, no vested proprietary interest in any property composing the community, but only an expectancy. The surviving wife must take the community as she finds it, without any power to call the succession of her husband or his heirs to an account for any acts done or even waste committed during its existence, except in the case of a conveyance or other disposition in fraud of her rights.<sup>29</sup>

The rule in California, which may be said to control in some of the other jurisdictions, recognizes the supreme dominion of the husband and the wife's membership of the community, and her right to an equal share in the acquisitions and gains, but denies her any voice in the

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<sup>28</sup> 43 Cal. 581 (1872); 58 Cal. 115 (1881); 116 Cal. 339 (1897).

<sup>29</sup> 36 La. Ann. 506 (1884).

management of the community affairs, or any vested tangible interest in the community property.<sup>30</sup>

In Texas, the interests of husband and wife in community property are denominated beneficial interests, and are on an equality whether the deed of conveyance by which real estate is acquired by them be in the name of either or of both. The wife or heirs have beneficial title in fee simple, which, save as to the husband's power of management and disposition during her life, and power to sell for the payment of community debts after her death, is in no degree subordinate or inferior to his right.<sup>31</sup>

#### 47. Community Debts and Rights of Creditors.

Community debts, generally, are all the obligations contracted during the marriage. The separate debts of the husband are community obligations whether they be antenuptial debts or other separate debts, for which the community property is liable as well as the husband's separate estate. In Washington, however, where the husband cannot convey or encumber real property, unless the wife join with him in executing the deed or other instrument, community real estate is not liable for any debts, except community debts.<sup>32</sup> Having no authority to sell real estate, the husband cannot bind the community for an indebtedness incurred by him in employing a person to find a purchaser therefor, or for other similar acts; but, in that state, as in the other community-property jurisdictions, community real estate is liable for the liens of mechanics and material men, which are debts that the husband has power to contract.<sup>33</sup>

In some states, the antenuptial and other debts of the wife are chargeable against community property and may be collected from it. This is the rule in community-property states where the common-law liability for the debts of the wife still attaches to the husband. In Louisiana, the rule is different, the law in that state asserting that husbands are not responsible for the debts of their wives contracted before

<sup>30</sup> 15 Cal. 311 (1860); 17 Cal. 538 (1860); 115 Cal. 266 (1896); 116 Cal. 339 (1897).

<sup>31</sup> 48 Tex. 268 (1887); 68 Tex. 329 (1887).

<sup>32</sup> 7 Wash. 112 (1893).

<sup>33</sup> 1 Hill's Code, Sec. 1,400.



marriage, nor wives for those of their husbands; each must be acquitted out of their own personal and individual effects.<sup>34</sup>

Creditors may resort either to community property or to the husband's separate property to satisfy their debts, and a creditor, to whom is owing a separate debt of the husband, may have satisfaction out of the community property, except as to real estate in Washington.<sup>35</sup>

**48. Dissolution.**—Dissolution of the community takes place: (1) By the death of either husband or wife; (2) by decree, or judgment, of divorce, either from bed and board or from the bonds of matrimony; and (3) in Louisiana, by judgment for separation of the property or judgment giving to the heirs of an absentee provisional possession of his or her estate.<sup>36</sup> There can be no legal dissolution by mutual agreement to dissolve, nor by voluntary separation; nor will mere desertion of either party, not followed by judgment of divorce, effect a dissolution.<sup>37</sup> A wife will, however, forfeit her right to community gains by abandoning her husband and living in adultery with another.<sup>38</sup>

**49. Rights of Survivor.**—The rights of the survivor of the community, upon dissolution, attach in a different manner, depending on which spouse is the survivor, except that the right of the survivor, whether husband or wife, to half of the community property, after the community debts are paid—the community proper being a fund for the settlement of community debts—is inviolable. In Louisiana, in the event of actual dissolution by the death of the wife, the community remains in a sort of fictitious existence for the purpose of liquidation and settlement. The responsibility of the husband in regard to the community debts remains unchanged; he is absolutely and personally liable for their payment and his personal property may be seized and sold for their discharge. He retains the custody and control of the community property, and he has, so far as the final settlement and liquidation is concerned, the same rights he

<sup>34</sup> 12 Mart. (La.) 83 (1822).

<sup>37</sup> 7 Mart. N. S. (La.) 41 (1828).

<sup>35</sup> 6 Wash. 17 (1893); 10 Wash. 239 (1894).

<sup>38</sup> 15 Tex. 241 (1855).

<sup>36</sup> 3 Wash. 356 (1891); 10 La. Ann. 303 (1855); 31 Cal. 33 (1866).

had during its existence, being under the same responsibilities as he was before dissolution, which rights extend to collecting debts owing to the community; but he may not, as survivor, convey community property, that is, he can convey no more than his share of it.<sup>39</sup> In that state, under the civil code, if a husband after the death of his wife mortgage community property for his debt, and afterwards die while their son and heir is still a minor, but after he has been emancipated, the latter does not render himself liable for the debt, as universal heir of his father, by simply taking possession of the property and receiving to his own use the rents and profits thereof.<sup>40</sup>

Under the Louisiana code, the wife and her heirs or assigns, in the event of dissolution, have the right to exonerate themselves from the debts contracted during the marriage by renouncing the community of gains, and, by such renunciation, the wife loses every sort of right to the effects of the community of gains, but she takes back all her effects. But a wife, who has an active concern in the effects of the community, cannot renounce the same, and if a surviving wife wish to preserve the power of renouncing she must make an inventory within the delays and with the formalities prescribed for the beneficiary heir.<sup>41</sup> A surviving wife has thirty days, by statute, in which to renounce or accept the succession of her husband, and, if she accept, she becomes liable for one-half of the community obligations. The wife's right to renounce may still continue after the delay of thirty days, and until she is compelled by an action to make her choice.<sup>42</sup>

In Texas, the survivor of the marital relation has power to sell the community property for the payment of debts, without administration upon the deceased member's estate. Upon giving bond and taking possession of the community estate, the surviving husband or wife becomes a trustee thereof for the creditors and distributees, and is vested with

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<sup>39</sup> 46 La. Ann. 353 (1894); 48 La. Ann. 717, 720 (1896); 26 La. Ann. 230 (1874); 29 La. Ann. 666 (1877).

<sup>40</sup> 99 U. S. 168 (1878).

<sup>41</sup> Code of La., Sec. 2,410.

<sup>42</sup> 22 La. Ann. 435 (1870).

ample power and a very broad discretion; but, in case of the wife's remarriage, her authority is revoked.<sup>43</sup> The husband, as survivor, may sell the community estate to pay community debts, after the filing of an inventory and other strict compliance with the statute; as survivor, he also has the right to complete a transaction begun by him before the wife's death; and if, during the community's existence, he entered into a contract to convey community land, he may, after the wife's death, make the deed of conveyance.<sup>44</sup>

50. In the other jurisdictions, the rights of the respective survivors are similar to those in Louisiana and Texas, with some special provisions, as, in California, where the husband, as survivor, takes all of the community estate as his own absolutely, without administration, except such portion which may have been set apart to the wife before her death, which becomes hers to dispose of by will, if she desire, and, in her omission to do so, would descend to her heirs exclusive of the husband.<sup>45</sup> In California, by the force of recent court adjudication which limits her proprietary interest to an expectancy, the wife, as survivor, has no greater authority over the community property than has an heir.<sup>46</sup>

In Idaho and Nevada, the rule of California is followed in the event of the wife's death, the husband taking the entire community property absolutely, except that in case of abandonment of his wife and living apart from her without such cause as would entitle him to a divorce, the half of the community property, subject to its equal share of the debts chargeable to the estate owned in the community, is at her testamentary disposition in the same manner as her separate property, or descends to her heirs, in the case of her omission to dispose of the same by will.<sup>47</sup>

In Washington, the only judicial adjudications which appear to indicate the tendency of a survivor's right and powers are denial of a survivor's right to dispose of more than the half of the community property belonging to said survivor;

<sup>43</sup> 60 Tex. 96 (1883).

<sup>46</sup> 116 Cal. 337 (1897).

<sup>44</sup> 48 Tex. 484 (1878); 23 Tex. 585 (1859).

<sup>47</sup> Idaho Rev. Stat., 1887, Sec. 5,712.

<sup>45</sup> Civ. Code of Cal., Sec. 1,401.

that upon the death of the wife the husband's right to dispose of the entire estate terminates; that upon the death of either husband or wife the administration of his or her estate necessarily draws it to the administration of the entire community property; and that a husband and wife cannot appoint an executor to take charge of the community estate to the exclusion of the surviving spouse.<sup>48</sup>

**51.** The heirs to whom community property descends take it subject to all debts legally chargeable against it, including debts owing to either husband or wife, and they take the share, or one-half, of the community property, which represented the interest of the deceased party, such interest vesting in the heirs at the moment of death, subject to the survivor's right of homestead and administration, and any other right in favor of the survivor which exists by local statutes.<sup>49</sup>

**52.** The right of administration varies according to the statutes of the respective jurisdictions. In Texas, a special form of administration is provided for community property by statute, and, by complying therewith, either survivor may administer under it; if the survivor do not qualify under the statute, he or she will be held strictly as trustee.<sup>50</sup> In California, Idaho, Louisiana, Nevada, and Washington, upon the death of the husband the administration of the husband's estate involves the administration of the entire community. The same result occurs on the death of the wife in Washington.

**53.** The power of disposition by will by either husband or wife is limited to the testator's share of the community property, that is, the half or moiety. Included in each one's power of disposition by will is his or her separate estate. Neither can effect the interests of the other in his or her disposition by will.<sup>51</sup> A married woman may dispose of her property by will subject to the liability of her community property for the payment of community debts.<sup>52</sup>

<sup>48</sup> 3 Wash. 356 (1891); 7 Wash. 33 (1893);  
6 Wash. 285 (1893).

<sup>51</sup> 5 Cal. 252 (1855); 20 Tex. 731 (1858).  
<sup>52</sup> 56 Tex. 124 (1882).

<sup>49</sup> 41 La. Ann. 348 (1889); 75 Cal. 134 (1888).

<sup>50</sup> Rev. Stat. of Tex., 1879, c. 28; 39 Tex. 243 (1873).





# THE LAW OF HUSBAND AND WIFE

(PART 2)

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## RIGHTS AND DISABILITIES

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### THE WIFE'S SEPARATE ESTATE

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#### EQUITABLE AND STATUTORY DOCTRINES

1. The separate property of a married woman is all that she has independently of her husband, the control or disposition of which is given by the law to her exclusively.<sup>1</sup> On this subject, there is an equitable doctrine and a statutory doctrine.<sup>2</sup> The equitable doctrine of the separate property of a married woman, which, as before stated, is the creature of equity, sets at naught most, if not all, of the common-law principles touching the marital relation. It emancipated a married woman from the stringent disabilities under which the common-law procedure placed her, to the extent of permitting her to be invested with property which was recognized by the courts of equity, during her coverture, as her own, unaffected by her husband's marital rights.<sup>3</sup> "Nothing," says an authority, "was more diametrically opposed to the principles of the ancient common law than this capacity to be a separate proprietor conferred upon the wife; and no equitable doctrine perhaps interfered with a greater number of legal rules concerning the status of marriage, and the proprietary rights of the husband which it created."<sup>4</sup>

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<sup>1</sup> 2 Bush (Ky.) 115 (1867).

<sup>2</sup> Schoul. Dom. Rel., Sec. 102.

<sup>3</sup> 15 Ala. 169 (1849).

<sup>4</sup> 1 Pom. Eq. Jur. (1892 Ed.), Sec. 52.

The effect of the doctrine on a married woman's status is to empower her to have, hold, and enjoy a separate estate and, under certain circumstances, or conditions, to dispose of and charge it, as if she were a single woman; but, unaided by statutory provisions, under this doctrine, she cannot act fully as a single woman.<sup>5</sup> She cannot contract so as to be sued, or render herself liable to the bankruptcy law. She is only liable to be sued as in equity for the purpose of attaching her separate estate.<sup>6</sup> "Where property comes to the wife's separate use, it is treated in equity as trust estate, of which she is *cestui que trust*. Yet it is not actually necessary that the instrument constituting the separate use should itself make an appointment of trustees. Formerly the rule was otherwise; but at the present day equity makes the husband a trustee where no other holds possession, and this supports the trust."<sup>7</sup>

The legislation which has followed—summarized elsewhere in this title<sup>8</sup>—created a statutory separate estate in married women, which has features distinguishing it from the equitable separate estate. While both classes of separate estates may exist together, they are independent and altogether different. One is an estate existing in trust, which has grown up with equity jurisprudence without recognition in courts of law, depending exclusively for life and protection upon the equity courts, which administer that department of jurisprudence. The other is a statutory legal estate, the product of modern legislation. Both pursue parallel, but separate, lines, and refer to different systems of jurisprudence, for the rules and principles which pertain to and characterize them.<sup>9</sup>

#### HOW THE ESTATE IS CREATED

**2. In Equity.**—An equitable separate estate may be created by devise, deed of conveyance, or sale, or gift, either in writing or parol, by a third party, or the husband may

<sup>5</sup> 12 Ch. Div. (Eng.) 484 (1879).

<sup>6</sup> 12 B. Monr. (Ky.) 329 (1851).

<sup>7</sup> Schoul. Dom. Rel., Sec. 104, citing 2 P. Wms. (Eng.) 316 (1725).

<sup>8</sup> See *subtitle* Under the Statutes *infra*.

<sup>9</sup> 51 Miss. 183 (1875); 16 B. Monr. (Ky.) 374 (1855).

permit his wife to set apart the proceeds of her general estate to her own separate and exclusive use, or he may by an antenuptial agreement or postnuptial settlement, properly executed and free from fraud as to creditors, give to her a portion or all of his own estate to be so held and enjoyed.<sup>10</sup> No particular form of words is necessary to the existence of an equitable separate estate in a married woman. It is only needful that an intention to invest the property in the wife to the exclusion of the husband, shall clearly appear.<sup>11</sup> Without adequate words showing a plain intention to create an estate for the sole and separate use and enjoyment of the wife, and the exclusion of the husband's marital rights in the property, only an ordinary trust for the wife will be created.<sup>12</sup>

Common phrases which show an intention to exclude the husband's rights, employed in the settlement of separate estates on married women by third parties, or strangers (persons other than the husband), are: "For her sole and separate use"; "for her sole and separate benefit"; "for her sole use."<sup>13</sup> Phrases which have been held to be insufficient in themselves to show the necessary intention are: "The use, benefit, and behoof of his wife"; "for her own use"; "in her own right." Generally, whenever the intention to create a separate estate can be gathered from the phrase used in the instrument, the particular language in which it is couched becomes unimportant.<sup>14</sup> In the case of a note executed to a married woman, or in the purchase of stocks, it may be shown by evidence, otherwise than by the paper or writing, that the creation of a separate estate was intended; and this character need not be imparted to it by the writing which invests her with the right to it. The paper need not, in itself, show an intent to exclude the husband.<sup>15</sup> So, where a husband makes a gift or grant to his wife, the intention to relinquish his own rights in favor of his wife, and thus

<sup>10</sup> 71 Ky. 175 (1871); 2 Md. Ch. 353 (1847).

<sup>11</sup> 84 Ky. 571 (1886); 15 Wall. (U. S.) 471, 474 (1872).

<sup>12</sup> 18 Ohio St. 43 (1868); 24 Gratt. (Va.) 250 (1874); 1 Madd. (Eng.) 199 (1821).

<sup>13</sup> 9 Ves. Jr. (Eng.) 583 (1804); 3 Ired. Eq. (N. C.) 236 (1844).

<sup>14</sup> 2 Bush (Ky.) 320 (1867); 2 R. & M. (Eng.) 183 (1831); 28 Md. 436 (1867); 105 Mass. 488 (1870); 26 Ala. 336 (1855).

<sup>15</sup> 84 Ky. 571 (1886).

to give her a separate property, is necessarily and clearly manifested, and no such words need be used as are necessary to create such an estate by a third person, or stranger, on the principle that the doctrine that "a gift to the husband is a gift to the wife" cannot apply where the husband himself creates the separate estate in the wife.<sup>16</sup>

**3. Under the Statutes.**—The effect of the married woman's enabling statutes has been to convert the wife's equitable into a legal estate, by which a married woman's rights and powers are enlarged and more clearly defined, but the jurisdiction of the courts of equity over her separate estate remains unaffected by the statutes in some states.<sup>17</sup> After the enactment of some of the enabling statutes, but before the very recent ones, a well-known authority declared: "The effect of this legislation upon the equity jurisdiction in the United States must be very great. In the first place, the married woman's equitable separate estate, and the doctrines of equity directly concerned with its maintenance, are, for the future at least, superseded. The fabric constructed by the chancellors with so much acumen and skill, in order to protect the natural rights of wives which the law ignored, is virtually overthrown. The law, by conferring full legal ownership upon married women, has done for them much more than family settlements or nuptial contracts can do, even when enforced by courts of equity. Equity in the United States is thus at one blow relieved of a subject-matter which in England occasions a very large part of its actual jurisdiction." This statement in the author's text was modified in a note, wherein he stated that the statutes "do not affect existing estates held in trust for wives; but in many of the states they authorize the wife, by means of an order of court, to convert such equitable interests into legal estates; that is, to compel a conveyance of the land directly to themselves by the trustees. Nor do these statutes forbid the creation of trusts in favor of married women in

<sup>16</sup> 3 Cush. (Mass.) 191 (1849); 9 Bush (Ky.) 307 (1872); 81 Ill. 64 (1876).

<sup>17</sup> 18 Hun (N. Y.) 35 (1879); 83 Ga. 727 (1889); 22 Mich. 255 (1871); 131 Pa. 476 (1890).

future, and such trusts are even now occasionally created; but all necessity for them, in order to protect wives against the acts or defaults of husbands, is removed, and the only advantage of such a trust is the protection of the land against the acts of the wives themselves, by so arranging the ownership that they can neither alienate nor encumber it.”<sup>18</sup>

With respect to the contracts of married women, it is claimed that “the effect of the modern legislation has been directly the opposite in different states. In those commonwealths where wives have been clothed with large capacity to contract, and their contracts have been made legal, the equitable jurisdiction over their agreements has been virtually abrogated. Whatever kind of contract is within the power of a married woman falls under the ordinary jurisdiction of the law courts, and a suit in equity to enforce it as a charge upon any specified property belonging to her would be useless, even if it could now be maintained. In all the other states where the wife’s contracts are not yet made legal, the equitable jurisdiction is to a certain extent enlarged. It is no longer confined in its operation to her separate equitable estate held in trust for her by an express or implied trustee; it reaches to and operates upon all her property of which she holds the full legal title and interest. While the wife’s power to make contracts which shall be a charge upon her property is not increased, the property thus affected, and which can be reached by a court of equity, is all which the wife holds in her own name and right by a legal title.”<sup>19</sup>

In a more recent judicial review of the subject it is stated that “the sole purpose of the original statute of 1848 (in New York) was to secure to married women the enjoyment of their real and personal property, which belonged to them at the time of their marriage, or which they might thereafter acquire by gift, grant, or bequest from third persons, and to abrogate the common-law right of the husband in and to the real and personal property of the wife. The right to the rents and profits of her lands *jure uxoris* (by right of the wife),

<sup>18</sup> Pom. Eq. Jur., Vol. 1, Sec. 80.

<sup>19</sup> *Ibid.*



during their joint lives, was completely swept away, not by express enactment, but as a necessary consequence of investing her with the beneficial use of her property, free from his control. Subsequent legislation confirmed her rights as defined by the act of 1848, and enlarged them in other directions, but the act of 1848 was the seed from which all the subsequent legislation sprung. This legislation rendered unnecessary any longer the cumbrous mechanism of settlements or resort to the imperfect powers of courts of chancery to secure to married women the enjoyment of their own property."<sup>20</sup>

#### OF WHAT THE ESTATE MAY CONSIST

4. Included in statutory separate property of a married woman is (1) that property, real or personal, which belongs to her at the time of her marriage, subject to proof to the contrary; (2) her earnings; (3) that which she purchases with her own money, especially with her earnings; (4) that which she receives by gift, conveyance, exchange, the devise or bequest of a will, descent or distribution under the intestate laws, and property which is held in trust for her by her husband. Generally, a separate property of a married woman embraces all that may be construed under the statutes, which have been passed for the protection of herself and property, to constitute such an estate.<sup>21</sup> The law presumes that all property, real or personal, owned by a married woman is her statutory estate, and is held to be such in the absence of proof to the contrary,<sup>22</sup> including personal property, such as household effects and the like, which both husband and wife hold and enjoy together in the house occupied by both.<sup>23</sup>

5. **Earnings of the Wife.**—All money or property gained by a married woman by her labor or services, or from any business or trade she may conduct for herself with

<sup>20</sup> 144 N. Y. 314 (1895), by Andrews, C. J.

<sup>21</sup> 82 Ala. 574 (1887); 18 Wall. (U. S.) 476 (1873); 11 Atl. Rep. 645 (1887); 94 U. S. 767 (1876); 54 Ill. 244 (1870); 2 Bush (Ky.) 172 (1871); 84 Ky. 565 (1886).

<sup>22</sup> 86 Ala. 168 (1888); 45 N. J. Eq. 84 (1889).

<sup>23</sup> 10 Phila. 179 (1873); 24 Mo. App. 264 (1887).

her separate capital, are her separate earnings. The stock in trade of a married woman, which she owned when she married or afterwards acquired with her earnings, is included in the term *earnings*. To entitle her to her earnings the statutes, for the most part, specifically mention earnings, and when they do not, her earnings are not her separate property as against the common-law rights of the husband to the same; but they may be secured to her when she has no statutory right to them as separate estate by the husband's assent, by agreement with the husband, by way of settlement before marriage or by gift from him during coverture, when such gift is not in fraud of creditors.<sup>24</sup>

Earnings which are the wife's separate property, and in nearly all the United States they are made such by statute, are her separate property free from liability for the husband's debts; but, by statute in some states, this right of the wife is modified by the provision, that her earnings are her separate property free from liability for the husband's debts, only where the husband has deserted her, or where the wife lives apart from the husband, or on account of drunkenness or profligacy of the husband.<sup>25</sup> In some states, it is held that if the husband permit his wife after marriage to carry on business on her sole and separate account, all that she earns in trade will be deemed to be her separate property, and disposable by her as such.<sup>26</sup> Where a husband employs his wife and pays her wages otherwise payable to some other employe, she cannot be deprived of the money, or of the property in which she has invested it.<sup>27</sup>

Classes of property which comprise the separate estate of a married woman are the following: Choses in action, which a married woman may acquire as other personal property; damages for tort or injuries to her person or property, by the liberal interpretation of the married woman statutes of some states; rents and profits, and the increase of a wife's separate

<sup>24</sup> 18 Wall. (U. S.) 476 (1873); 74 Pa. 448 (1873); 124 Pa. 311 (1889); 94 U. S. (1876); 18 N. J. Eq. 478 (1867); 75 Ind. 301 (1881); 7 B. Monr. (Ky.) 445 (1847); L. R. 6 Ch. Div. (Eng.) 739 (1877).

<sup>25</sup> 18 Wall. (U. S.) 476 (1873); 64 Ill. 238 (1872); 71 Cal. 418 (1886); 110 Pa. 486 (1885).

<sup>26</sup> 71 Ky. 175 (1871); 86 Ala. 168 (1889).

<sup>27</sup> 30 Atl. Rep. 867 (1894).

property, be it real or personal, growing crops, manure, the increase of domestic animals, anything produced on or from land which is her separate property. Where a husband assists in farming his wife's lands, the crops are presumed to be hers, not his.<sup>28</sup> A married woman who has brought money or other property into this country from another country, or where she owns separate property in one state, and moves with her husband into another state, is entitled to retain such property as her separate estate.<sup>29</sup>

In her ownership and enjoyment of her separate personal property the wife is protected by the law against her husband's creditors. She may maintain an action of replevin to have restored to her property which has been levied on by an officer for her husband's debts.<sup>30</sup> Generally, it is incumbent on a married woman, who claims as her separate estate property which has been attached by process at the suit of creditors of her husband, to show that she owned the property before her marriage, or that she acquired it since in a way entirely independent of her husband.<sup>31</sup>

### THE HUSBAND'S DUTIES AND RIGHTS

6. The right of husband and wife to each other's society and companionship is guaranteed to each by the law, and, when interfered with, the law gives the injured party redress. As forcefully stated, in the words of Sir Thomas Smith, "the naturalest and first conjunction of two towards the making a further society of continuance is of the husband and wife, each having care of the family: the man to get, to travel abroad, and to defend; the wife to save, to stay at home, and to distribute that which is gotten for the nurture of children and family; which to maintain God has given the man greater wit, better strength, better courage, to compel the woman to obey by reason or force, and to the woman beauty, fair countenance, and sweet words, to make

<sup>28</sup> 85 Va. 169, 171 (1888); 45 Md. 1 (1876);  
21 Mich. 215 (1870); 52 Ill. 260 (1869); 63  
Md. 113 (1884); 16 Atl. Rep. 862 (1889);  
92 Pa. 338 (1879); 86 Ind. 286 (1882).

<sup>29</sup> 20 Mo. App. 50 (1885); 80 Mo. 626 (1883)

<sup>30</sup> 62 Ind. 598 (1878).

<sup>31</sup> 11 Atl. Rep. 645 (1887).

the man obey her again for love. Thus each obeyeth and commandeth the other; and they two together rule the house so long as they remain in one."<sup>32</sup>

To the obligation of the husband to love, cherish, and protect, and that of the wife to love, honor, and obey is attached the mutual obligation of cohabitation, to adhere and live together, and this presupposes a suitable home to be furnished by the husband, according to his means and condition in life, and his duty to provide for her maintenance and support. Custom has fixed that, by marriage, the husband's surname is conferred on the wife.

**7.** The husband is **the head of the family**, as supreme now in the enjoyment of that right as heretofore under the common law, when the legal existence of the wife was incorporated into that of the husband; and his dominion is as fully recognized, for all the modern legislation in behalf of the wife has not created such a radical change as to displace the husband from his position as the head of the family, nor has that legislation affected, to any appreciable extent, the other strictly personal consequences of the marriage relation.<sup>33</sup> When the husband is unfit to act as the head of the family because of his insanity, or when he is absent from home for a long period, the wife is regarded as the head of the family.<sup>34</sup> Even though both reside in a house which belongs to the wife as her separate property, the rights of the husband as the head of the family are not affected, and it is his lawful right to prevent her from making an illegal use of the family dwelling house. He is, also, in such case considered by the law as having such ownership and possession as to make the house his own for most purposes of a proper kind.<sup>35</sup>

**8.** The duty of the husband **to support and maintain the wife** is an obligation to support her in his family and not elsewhere. An obligation to support her elsewhere

<sup>32</sup> Commonwealth of England, Book 1, c. 2, quoted in Schoul. Dom. Rel., p. 63, from Bing. Inf. & Cov., p. 184.

<sup>33</sup> 11 Mich. 485 (1863); 97 Mass. 229 (1867).

<sup>34</sup> 41 Am. Rep. 835 (1881); 42 Am. Dec. 532 (1844).

<sup>35</sup> 124 Mass. 30 (1878); 86 Ga. 396 (1890).

could only arise by his turning her out of doors, or by his being guilty of such conduct as would justify her in leaving him.<sup>36</sup>

9. It is the husband's absolute right to fix the domicile, or place of residence of both. Wherever he goes she is bound to go, but the intent on his part must be honest and in good faith and must not deprive the wife of any of her rights.<sup>37</sup> He has the right to fix the domicile at any time and at any place he pleases, and it is the wife's duty to follow him through the world.<sup>38</sup> He may not force her to live in a place unfit for her to occupy with dignity, nor may he change the place of residence through whim and caprice and force her to follow him; nor take her to a remote or undesirable place in order to vex her or punish her. He may not take her to a place where he has no intention of living with her, or to a place where her health may be endangered or her comfort denied.<sup>39</sup> It was held in a Missouri lower court, in a recent case, that where a husband takes his mother, who is dependent upon him, into his family against the wishes of his wife, and the latter thereupon leaves him, he will not be entitled to a divorce on the ground of desertion until he has offered to provide a separate home for his wife and she refuses to live with him therein.<sup>40</sup>

10. The right of chastisement and correction, which under the old procedure was tolerated only in moderate manner, has, in late days, been superseded by a policy of persuasion. The law does not tolerate cruelty by either spouse against the other, and it opens the divorce courts to the injured one. That which was regarded as chastisement and correction under the common law, and which, among the lower classes in England, was taken as extending the right of the husband to the unchristian privilege of whipping his wife, is now regarded in England and the United States

<sup>36</sup> 37 Mich. 563 (1877).

<sup>37</sup> 3 Ch. Div. (Eng.) 518 (1876).

<sup>38</sup> 7 Bush (Ky.) 135 (1870).

<sup>39</sup> 2 Brew. (Pa.) 511 (1869); 30 Pa. 412 (1858); 23 N. J. Eq. 346 (1837); 29 Vt. 148 (1856);

4 Wis. 64 (1855).

<sup>40</sup> Ed. Thompson Co's. Law Notes, April, 1901, p. 12.



as assault and battery, and a husband who whips his wife may be prosecuted and punished. Under our present conditions of civilization, a husband has no legal right to chastise his wife under any circumstances.<sup>41</sup>

**11.** The husband's right of gentle restraint, which has its basis in the husband's marital authority over his household, extends only to cases where the wife's conduct is such as to save his honor or estate; in such cases, the husband may resort to measures to put his wife under restraint to prevent her.<sup>42</sup> If, for instance, a wife's intention to elope with a stranger is being put into effect, or if she associate with a bad companion, or squander her husband's estate and effects, the lawful right of the husband to restrain her will not be questioned; but this right may be exercised only when absolutely necessary and without undue severity. The exercise of restraint by force, physical or moral, in such a manner as to injure the wife's health and threaten disease, is legal cruelty.<sup>43</sup> There is no general rule by which the right of restraint may be gauged. The courts hesitate at permitting physical restraint and almost invariably send a husband to his remedy by divorce, rather than pronounce him lawfully able to exercise force. In a recent English case, it was held that a husband has no right to restrain the liberty of his wife's person, in the absence of any other injury to him than the mere loss of her society.<sup>44</sup>

**12.** The husband's right to cohabit with his wife is based on the general principle of the mutual right of each to the society of the other. For the violation of this right no remedy is given by law in the United States, except that, for the proper cause, the husband may sue for divorce.<sup>45</sup> In England, the husband may sue for a restitution of conjugal rights, when the right of cohabitation is denied him, but a cessation of cohabitation must be shown to warrant a decree.<sup>46</sup>

<sup>41</sup> 1 S. & T. (Eng.) 601 (1860); 2 Harr. (Del.) 552 (1838); 70 N. C. 60 (1874); 42 Tex. 241 (1875).

<sup>42</sup> 28 N. C. 164 (1845).

<sup>43</sup> 2 Kent's Comm. 181; 97 Mass. 373 (1867).

<sup>44</sup> (1891) 1 Q. B. (Eng.) 671.

<sup>45</sup> 57 Iowa 370 (1881); 89 Ga. 471 (1892).

<sup>46</sup> 97 Mass. 329 (1867), citing 2 Addams (Eng.) 382 (1824).

**13.** The right of custody of children, which under the common law belonged to the father, is now regulated by statutes in the various jurisdictions, the tendency being to place the wife on a more equal footing with the husband. This subject is treated fully elsewhere in this Course.<sup>47</sup>

#### PROPERTY RIGHTS OF HUSBAND

**14. In His Own Property.**—Entering into the marriage relation does not change the husband's rights in property which is exclusively his own. He holds all that he held before marriage, and what he acquires during the coverture by the same free right as before the marriage, subject only upon his death to the wife's right of dower or other rights, secured to her by the laws concerning the estates of decedents. Legislation in behalf of the wife has not destroyed the husband's interest in his own property, nor annihilated any of the evidences of his title. That which before was evidence of ownership in him is evidence now.<sup>48</sup>

**15. In the Wife's Realty.**—The husband has certain rights in the real property of the wife, which are unaffected by the married woman's enabling statutes. In England, the right of curtesy entitles the husband to an estate in the undisposed-of real estate of the deceased wife, notwithstanding the Married Woman's Property Act of 1882.<sup>49</sup> In the United States, that right exists in the husband as under the common law, except as modified or abrogated in certain jurisdictions.<sup>50</sup> But, apart from the right of curtesy, the law, as carefully construed, draws a fine line between property rights of the husband in the wife's realty which still exist, notwithstanding married women's enabling statutes, and those rights which no longer exist because of the statutes. These statutes reduce the property rights of the husband as they existed under the common law of coverture, but, when a complete legal estate in the wife's realty has already vested in the husband, it is not taken away by the statutes,

<sup>47</sup> See *The Law of Parent and Child*.

<sup>48</sup> 37 Pa. 156 (1860).

<sup>49</sup> 2 Ch. Div. (Eng.) 336 (1892).

<sup>50</sup> See *The Law of Property: Tenancy by the Curtesy*.

nor is the effect of a previous conveyance of land to husband and wife jointly changed in respect of survivorship.<sup>51</sup> The general rule is its own proposition, that "no statute is to have a retrospect beyond the time of its commencement." All laws are prospective, not retrospective; hence, rights of the husband, which at the time of the passage of the acts in behalf of married women, were vested rights, still exist as an estate in the husband.<sup>52</sup> The husband's vested rights arising under a marriage cannot be constitutionally disturbed by an alteration of the law; his mere expectancy, or the possibility of some future acquisition by right of marriage, is subject to any change which the legislature may choose to make prior to the vesting of a right in the husband.<sup>53</sup> The courts sustain these views by holding, that the married woman's legislation was not intended to divest the interest which a husband, before the legislation was passed, had in real estate of the wife. Such action would be unconstitutional.<sup>54</sup>

It cannot be stated as a positive claim that a husband has no interest whatever in the wife's separate equitable or statutory estate, but it may be said, with greater precision, that the husband has no interest in the wife's property, which is guaranteed to her as her separate estate, free from her husband's control and free from his debts and liabilities, by legislation having reference, not to a wife's property in the mass, but to property owned by her before the marriage or suitably acquired in certain instances by way of exception to the old common-law rule as to coverture; where, in short, the separate-estate intention is clearly expressed.<sup>55</sup> And, in spite of the broad intention of some of the statutes, the courts in some of the United States still hold to the presumption that a married woman's property belongs to the husband as under the old procedure, except in cases where the intent to make the property the wife's own, separately and completely, is couched in the plainest words that

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<sup>51</sup> Schoul. Dom. Rel., Sec. 114, citing 11 S. C. 71 (1878); 76 Ill. 536 (1875).

<sup>52</sup> 22 Fed. Cas. 1,107 (1867); 136 U. S. 300 (1890).

<sup>53</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 114.

<sup>54</sup> 22 Pa. 164 (1853); 10 Pa. 505 (1849).

<sup>55</sup> 2 Tenn. Ch. 368 (1875).

it is possible to employ to effect such intention. In some states it is held that the legislation did not make the separate estate of a married woman so exclusively her own as to exclude the husband's use of it, as the head of the family, or enable her to invest it in any way she pleases without his consent; and, that when the husband as the head of the family occupies and cultivates the land of the wife, he must be considered as occupying it with her consent for the common benefit of the family; and the products of his toil upon such is his property, notwithstanding the statute, as if he occupied, as a tenant, land rented from some third person.<sup>56</sup>

**16.** The husband's estate in his wife's realty, where he has an interest in her estate under the common law and in default of a statute vesting the estate absolutely in the wife by the proper words required to make it her separate property entirely free from his control and debts, is a freehold estate or interest in her estate of inheritance during the joint lives of himself and wife, and also in her estates for life, and he is entitled to the rents and profits of the same; and it is such a vested interest in possession of which he cannot be deprived except by due process of law.<sup>57</sup> It is such an estate that, in some states, exists independently of the birth of issue. By an Oregon statute, for instance, the common-law rule in this regard is not changed, but it provides that, upon the death of the wife, the husband shall be tenant by the curtesy whether issue be born alive or not.<sup>58</sup> And, in some states, it is held, that while under the statutes the husband, as such, has no estate in the lands of his wife, the possession of the husband in the right of his wife is not so destroyed as to render him liable to the demand of the wife, the owner of the land, for the rent of the home. It is held, also, that the legislature did not intend, by exempting rents and profits of the wife's realty from seizure for the husband's debts, to create, thereby, a separate estate in such rents and profits in the wife, and that the husband is still entitled to them; also,

<sup>56</sup> 36 Pa. 410 (1860); 152 Mass. 203 (1890);  
37 Ill. 241 (1865).

<sup>57</sup> 96 Tenn. 580 (1896); 5 Barb. (N. Y.) 474  
(1849); 11 Q. B. (Eng.) 916 (1848).

<sup>58</sup> 58 Ill. 30 (1871); 5 Saw. (U. S.) 249 (1878).

that while, under statutes giving to married women separate property rights, the husband has no interest in the wife's real estate which he can convey by his individual deed, he has the right to possess and enjoy the land, and the right can only be divested for the causes and in the mode specified by statute.<sup>59</sup>

The consensus of judicial opinion on this subject is that the legislative intention in placing a married woman in an estate of her own as her separate estate will be carried out whenever it appears that she has or is given or granted property to be held by her independently of her husband and as if she were single and not in fraud of his creditors. The wife's possession of property and her purchases, which were presumably the husband's under the common law, are presumably the husband's now, under the recent married woman's legislation, for the higher reason that without such presumption the legislation would open a wide door to the perpetration of fraud upon creditors; but these presumptions are rebuttable, and the burden of proof is on the wife if she allege the contrary.<sup>60</sup>

**17. In the Wife's Personalty.**—Under the common law, chattels real, money, and other personal property, and choses in action, which belonged to the wife at the time of her marriage, or which she acquired during coverture, became the husband's own. Whatever personalty the wife had in her possession in her own right when she married, or which came to her during the coverture, whether by gift, bequest, or otherwise, vested absolutely in the husband without any act on his part to assert his right, and it was his to do with as he pleased; it was subject to the claims of his creditors, and on his death his personal representatives inherited it.<sup>61</sup> Chattels real of the wife, upon marriage, became the husband's in the right of the wife, and he could do as he pleased with them, they being also liable for his debts. On her death they vested absolutely in him if he survived his wife, but they did not survive to him on her

<sup>59</sup> 15 So. Rep. 42 (1894); 96 Tenn. 580 (1896); 21 Mo. App. 528 (1886); 95 Mo. 68 (1888).

<sup>60</sup> 37 Pa. 161 (1860).

<sup>61</sup> L. R. 3 Q. B. (Eng.) 541 (1868).



death and pass to his heirs on his death, but survived to the wife, if the husband had not reduced them to possession by disposing of them or by some other equivalent act.<sup>62</sup> The wife's choses in action, when reduced to possession, became the husband's own also under the common law, and when not reduced to possession, if he died before the wife and she survived, or if he were divorced absolutely from her, all such of every kind, as remained choses in action, became the wife's absolutely as if she had always been a single woman.<sup>63</sup>

In the present age, under the married women's statutes, in all jurisdictions where such legislation properly and fully invests a married woman with a separate estate in her chattels real, personalty, and choses in action, the husband has no interest therein. In jurisdictions where the common law still holds good, the interest of the husband in such property is as has been explained in the three preceding paragraphs, and in preceding pages of this title.<sup>64</sup>

### THE WIFE'S RIGHTS AND DUTIES

**18.** It is the right of the wife to have **cohabitation** as fully as it is that of the husband. In the United States, she cannot enforce the right of cohabitation by the aid of law or equity, and she is sent to the divorce court for reparation if the right be denied her.<sup>65</sup> In England, she may enforce the right by a suit to restore her to her conjugal rights.<sup>66</sup>

The wife's right to support and maintenance by the husband which, as has been stated, is a duty on the part of the husband according to his means and condition in life, is enforceable at law, under the statutes, and sometimes in equity independent of the statutes.<sup>67</sup>

**19.** The wife's right of **protection** is as much the concern of the law when she is to be protected from the

<sup>62</sup> 25 Ch. Div. (Eng.) 620, 624 (1883); 50 Me. 371 (1862); 19 N. J. Eq. 230 (1868).

<sup>65</sup> 37 Mich. 62 (1877).

<sup>66</sup> 4 P. D. (Eng.) 63 (1878).

<sup>63</sup> 140 Mass. 340 (1887); L. R. 4 Q. B. (Eng.) 500 (1869).

<sup>67</sup> 20 Q. B. Div. (Eng.) 76 (1887); 144 Mass. 278 (1887).

<sup>64</sup> See *subtile* Coverture Under the Common Law *supra*.

husband's own acts as when the husband is her protector from the acts of others. The duty of the husband in protecting his wife from injury and insult may be performed even to the extent of excusing homicide in her defense.<sup>68</sup>

**20.** The wife's duty to render services in the family is derivative from the obligation of the husband's support of the wife, her services, and the comfort of her society being on a mutual equality with his support and maintenance of her. The law does not assume that the wife will be a burden on her husband to the full extent of all her support will cost. On the contrary the legal presumption is that her services are of a worth to him fully equal to all the obligations which the law imposes upon him because of the marital relation.<sup>69</sup>

The services of a wife in the family are not a matter of money recompense. Hence, it is held, a wife cannot found a suit for wages, promised by her husband, upon the enabling statutes which give her a right to her separate earnings.<sup>70</sup> While the enabling statutes give to the wife the benefit of her earnings under her own contracts, by labor performed for any one except her husband, her common-law duty to him remains, and, if he promise to pay her for working for him, it is a promise to pay for that which legally belongs to him.<sup>71</sup> The word *family*, in both its common and legal meaning, signifies that collective body of persons who live in one house and under the one domestic government.<sup>72</sup>

**21. Specific Rights of Property.**—Apart from the wife's right of dower, or that which legislation, in some states, gives her as an equivalent right, she has no interest in the real estate of her husband; but of his personalty, upon his death, she takes her distributive share as regulated by law in the various jurisdictions, which is the subject of another title. However, she has some specific rights in certain kinds of property, such as *paraphernalia* and *pin*

<sup>68</sup> 18 B. Monr. (Ky.) 514 (1857); 8 Mich. 174 (1860).

<sup>69</sup> 37 Mich. 563 (1877).

<sup>70</sup> 146 Ill. 577 (1893).

<sup>71</sup> 130 N. Y. 497 (1892).

<sup>72</sup> 63 Conn. 324 (1893).

*money*. There is, besides, what is called the wife's equity, or equity to a settlement, of which the court of chancery in its effort to deal justly with wives and children takes exclusive cognizance.

**22. Paraphernalia.**—The paraphernal property of the wife includes wearing apparel and ornaments of the person, suitable to her rank, condition, or degree, which she had at the time of the marriage, or which she has acquired by gift from her husband before or during the coverture. At common law the wife's paraphernalia, during coverture, belong to the husband and he can dispose of them, but not by his will or testament. If the wife survive the husband, she can claim such as remain of the paraphernalia against all persons except the husband's creditors. They are liable for the husband's debts during his life, and even after his death, where there is a deficiency of assets in the hands of his personal representative to settle up his estate.<sup>73</sup>

In England, and in some of the United States, property in paraphernalia is still governed by the common-law rule.<sup>74</sup> In most of the United States, such property becomes the separate estate of the wife by force of the married women's enabling statutes, and where paraphernalia are clothed with all the incidents of legal estate in the wife they are secured to her against the husband's creditors, and she may sue and be sued in reference thereto, but in the absence of proof of a gift to her the goods are the husband's property and he may sue.<sup>75</sup> The law relating to paraphernalia is little observed in the United States, statutory allowances having superseded such property which, in some of the states, is also protected by statute, either under the name of "paraphernalia," or as wearing apparel, jewelry, and the like.

In some states where judicial consideration has claimed the attention of the courts on this subject, the tendency is to adjudicate paraphernal property as at common law, if it be acquired by the wife from the husband otherwise than by

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<sup>73</sup> 48 N. Y. 215 (1872); 21 Ind. 288 (1863); 2

<sup>74</sup> (1895) P. (Eng.) 4; 119 Mass. 596 (1876).

<sup>75</sup> 48 N. Y. 215 (1872); 74 N. Y. 116 (1878)

such means as the married women's statutes specify as a gift or grant for her separate use; but, where the articles are purchased by a wife with her separate money, they are made her separate property within the meaning of the statutes concerning the rights and liabilities of married women. As to such property, it is held in Ohio that it was not intended by the statute in that state to deprive the husband of all ownership and control; for, while the duty of the husband to furnish his wife with necessary and suitable clothing is continued, it was not intended to deprive him of the right to control and preserve it. Nor does it make any difference where a wife purchases her apparel with pin money, given to her by her husband according to her will and pleasure; of such property, the possession of the wife is the possession of the husband.<sup>76</sup> It has been held, however, by the supreme court of Indiana, that a similar statute operates as to clothing of the wife acquired otherwise than from her husband, or through his means, so as to invest her with a separate estate therein. The court was inclined to think that there is good ground for the distinction. Where the wife's clothing is furnished by the husband in discharge of his marital duty toward her, the statute does not divest him of the property contrary to his intentions; while, on the other hand, where the property is otherwise acquired by the wife, the statute simply prevents a title vesting in him by virtue of his marital relation. Under the statute the "gift," which is declared to be the separate property of the wife, is a voluntary one, as all gifts must be, and does not embrace necessities which a husband is under legal duty to furnish his wife."

In some states, it is found by judicial inquiry that the statutes enacted to enlarge married women's rights and privileges have not in terms made any specific regulations in regard to the ownership of the wearing apparel. Except in cases where the wife herself purchases wearing apparel with her own separate money or earnings, that matter remains exactly as it stood at common law. If the articles

<sup>76</sup> 35 Ohio St. 517 (1880).'

<sup>77</sup> 44 Ind. 469 (1873).

of clothing and personal ornament appropriate for her be purchased with the husband's money, or upon his credit, the fact that they are purchased by her and intended for her personal and exclusive use does not render them any less his property.<sup>78</sup>

**23. Pin Money.**—An allowance or an occasional gift made by the husband to his wife, either voluntarily or as a part of the marriage settlement for her separate use, to be employed in the purchase of apparel or of ornaments for her person, or for other personal expenditures, is termed **pin money**. Technically, in law, it is an annual sum, arrears for which can be claimed only for one year, and by the wife, but not by her representatives.<sup>79</sup>

In the United States, the law respecting pin money is of little concern, compared with that of England, where it is an institution of great moment, being an important feature of English marriage settlements, and where it is distinctly an allowance, or sum set apart for the specific purpose of her apparel, pocket money, and ordinary expenses, payable by the husband by force of the arrangement made and to be used for the specific purpose intended. It is in no sense a gift by the husband to the wife out and out, and is not to be considered like money set apart for her sole and separate use during the coverture, excluding the rights of the husband. Its purpose is not that of the wife alone, but is for the support of the joint establishment consisting of husband and wife; for the maintenance of the common dignity.<sup>80</sup>

The law is so well settled in England on questions of pin money that few conflicts over it get into the courts. In the leading case on this subject, in which the pin-money doctrine was most fully expounded and which settled the question against the right of personal representatives of the wife to receive arrears of pin money, the basis and object of pin money was expressed as follows: "A person in a humble station in life pays his wife's bills as he pays his own; a person in a station a little higher is accustomed to make, for

<sup>78</sup> 119 Mass. 597 (1876).    <sup>79</sup> 2 Ves. (Eng.) 190 (1750).    <sup>80</sup> 2 Cl. & F. (Eng.) 634-658 (1834).



common convenience, an allowance to his wife of so much over for her own dress and the dress of her children; a person in a higher station still makes a general arrangement which probably extends over years, if not over the whole coverture; and a person in a higher station—in the highest—makes the arrangement of pin money by the marriage settlement”; and it follows that the husband has “a direct interest in the expenditure of the pin money; he has the right to have the pleasure of it, to have the credit of it, to be spared the eyesore of a wife appearing as misbecomes her station; that is the distinction and object of pin money.”<sup>81</sup>

In the exceptional cases which have been adjudicated in the English courts, besides those which have held against the right of representatives of a wife to arrears, it has been held that a wife may not collect from her husband or his personal representative arrears of pin money for more than one year, where she cohabits with her husband, the presumption being that she has been compensated by other allowances in lieu of pin money; but that where she lives apart from her husband an account of arrears will be decreed as far back as they go, there being no presumption of other compensation in such case.<sup>82</sup>

**24. The Wife's Equity.**—This is a right in the nature of a remedy, in the sense that a remedy is a judicial means of enforcing a right, and is generally defined to be the equitable right of a wife to have settled upon her and her children a suitable provision out of her estate whenever the husband cannot obtain it without the aid of a court of equity. It has its origin in the valuable maxim that “he who seeks equity must do equity,” and it is upon this maxim that the court proceeds in requiring a settlement.<sup>83</sup>

The wife's equity does not depend upon the wife's right of property in the subject-matter, for it must be enforced for the benefit of herself and children, and the amount is wholly discretionary with the court; it is an obligation which

<sup>81</sup> 2 Cl. & F. (Eng.) 678 (1834), by Lord Brougham.

<sup>82</sup> 1 Ves. (Eng.) 267 (1749); 2 Ves. (Eng.) 190 (1750-1).

<sup>83</sup> Shelf. M. & D. 605.

the court fastens, not upon the property, but upon the right to receive it—the right of the husband and those claiming under him to receive it, as well as that of the wife. The doctrine was first applied to cases only where the husband resorted to the jurisdiction of equity in order to enforce his marital rights and reach assets belonging to his wife. “Having been established in this application, it was soon extended to cases where the general assignees in bankruptcy or insolvency of the husband sought the aid of equity in reaching property of the wife. The court imposed on them the same conditions which it would impose on the husband himself. The next step was soon taken, and the doctrine was applied to particular assignees of the husband for a valuable consideration, whenever they attempted to enforce their assignments by a proceeding in equity.”<sup>84</sup>

The general doctrine is thus stated: Where the husband, or some person claiming under him, is suing in equity to reach the wife's property; and where the property is already within the reach of the court—as where it is vested in trustees, or has been paid into court, or is in any other situation which brings it under the control of the court—the court of equity will not grant the relief in the first instance, nor permit the property to be removed out of its jurisdiction and control in the second, until an adequate provision is made for the wife, unless special circumstances exist which defeat her right; and under a like condition of the property, the wife may herself institute a suit and obtain the relief.<sup>85</sup> The right of the wife, in equity, to a present provision, or settlement, out of her choses in action, in restriction of her husband's power to reduce to possession, is supported by considerations and governed by principles entirely distinct from those which pertain to and control her rights by survivorship.<sup>86</sup>

This ancient doctrine of the English equity courts is rejected in a few of the United States, and modern legislation in the larger number of the states, which has revolutionized

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<sup>84</sup> Pom. Eq. Jur., Sec. 1,114; 2 Ves. (Eng.) 680, 682 (1750-1); 4 Ves. (Eng.) 15, 19 (1798); 5 Ves. (Eng.) 737 (1801).

<sup>85</sup> Pom. Eq. Jur., Sec. 1,114.  
<sup>86</sup> 18 Md. 260 (1861).

the interests of the husband in the wife's property, under some conditions destroying it altogether and creating in her a separate legal estate, has removed the very foundation of the doctrine of the wife's equity and rendered it virtually obsolete.<sup>87</sup> In most states, the courts have held that the wife's equity to a settlement does not include property which the husband has previously reduced to possession.<sup>88</sup> The rule applies to the husband's interest in the wife's lands of which he has acquired possession.<sup>89</sup>

**25. The Right of Suffrage.**—In some of the United States, married women, as well as others of their sex, have the right of suffrage—the privilege of voting at elections. By the constitutions of Utah and Wyoming, it is provided that women may vote in all respects like men. In Colorado, Idaho, North Dakota, South Dakota, and Wisconsin, the constitutions confer on the legislature power to enact laws extending the right of suffrage to women of lawful age, having the other qualifications required of men, and, in some of those states, the legislature has passed laws carrying into effect the power thus conferred. Besides, in Colorado, the Dakotas, Minnesota, Montana, and other states, it is provided by the organic law, that women of the age of twenty-one years may vote at any election for school officers or on measures relating to schools.<sup>90</sup>

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## POWER TO CONTRACT

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### CONTRACTS BETWEEN THEMSELVES

**26. Former Disability.**—The contracts of husband and wife are considered with special regard to the legal ability of the wife to enter into contracts and incur liability. Except as to contracts between the husband and the wife, the husband has never been under legal disability, merely because of the marriage relation. At common law, on

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<sup>87</sup> 41 N. C. 293 (1849); Pom. Eq. Jur., p. 1,663, note.

<sup>88</sup> 31 Am. Dec. 257 (1837).

<sup>89</sup> See the statutes of these states

<sup>89</sup> 9 Watts (Pa.) 92 (1839); 4 Bush (Ky.) 37 (1868).

account of the unity fiction, valid contracts could not be made between husband and wife. The wife was under the common-law ban of disability until the invention of the equitable separate estate, and until by legislative innovation her powers to contract and incur liability were enlarged.<sup>91</sup>

In England, at common law, the wife may act as if she were single, or as if her husband were dead, where the husband is an alien, or in case of his banishment, or transportation for life as a convict, or if he abjure the realm and abandon her. In the United States, if a husband abandon his wife, cease to support her and the family, and take up an abode in another jurisdiction, the wife can act as if she were single.<sup>92</sup>

**27. The Wife's Power in Equity.**—Under the doctrine established by the English court of chancery, the wife's equitable separate estate is liable for her contracts made upon the credit of and with reference to such estate. This doctrine has been accepted in all of the United States, except that, in some states, a different way of applying the doctrine prevails from that in operation in England. This divergence is confined to the question—what kinds and forms of contracts do thus purport to be entered into with reference to the separate estate, and are intended to be made on its faith and credit?<sup>93</sup> The enlargement of the doctrine of equitable separate estate by legislation is universal, but, existing with certain variations in the different jurisdictions, is not uniform. To determine, with any degree of accuracy, the extent of a wife's capacity to contract and incur liability will require a close study of the statutes and decisions of each particular jurisdiction. However, as to her present status, it is claimed that a substantially correct solution may be gleaned from the general principles as herein stated.

Notwithstanding the common-law ban, "wherever a contract is just and reasonable in itself, and would be good at law when made with trustees for the wife, and especially if for good and meritorious consideration, that contract will be

<sup>91</sup> 52 Md. 307 (1879).

<sup>92</sup> 72 Md. 486 (1890).

<sup>93</sup> Pom. Eq. Jur., Sec. 1,125.

sustained in equity, when made between husband and wife without the intervention of trustees.”<sup>94</sup> A proposition warranted by legislation and the judicial decisions is: “Wherever the statutes have declared that the wife’s property, real and personal, belonging to her in her own right, and by a legal title, shall constitute her legal or statutory separate estate, but have not further provided that her contracts shall create liabilities against her to be enforced by ordinary legal actions and judgments, it is settled that her contracts shall be enforced in equity against this legal separate estate in the same manner and subject to the same rules as against an equitable separate estate.”<sup>95</sup>

**28. Antenuptial Contracts.**—Contracts made before marriage by parties who afterwards marry are known as antenuptial contracts and are, at common law, invalidated by the marriage. All debts due from one spouse to the other are, by the common-law rule, extinguished when the marriage relation is formed.<sup>96</sup>

No contract between the parties in contemplation of marriage will change the responsibility of the husband with respect to the debts of the wife created while single, for which he alone is liable, a responsibility which commenced with the marriage and only ceased with its termination;<sup>97</sup> nor do the married women’s enabling statutes remove the liability of the husband for the wife’s antenuptial contracts, as a general rule.<sup>98</sup> In some states, the statutes expressly release the husband from such liability;<sup>99</sup> in other jurisdictions, it is provided that to charge the husband with the antenuptial debts of the wife it must appear that he has received property or effects in the right of his wife sufficient to pay them, and is not responsible for the debts of his wife contracted while she was single beyond the value of the property he has received by her.<sup>100</sup>

<sup>94</sup> Schoul. Dom. Rel., Sec. 191.

<sup>95</sup> Pom. Eq. Jur., Sec. 1,125.

<sup>96</sup> 49 Ind. 235 (1874); 105 Mass. 115 (1870).

<sup>97</sup> 27 Ark. 288 (1871); 22 Gratt. (Va.) 177, 193 (1872).

<sup>98</sup> 44 S. W. Rep. 1,126 (1898); 46 Ill. 390 (1868).

<sup>99</sup> 48 Miss. 585 (1873).

<sup>100</sup> 23 Q. B. Div. (Eng.) 321 (1889); 88 Ky. 108 (1889).



Parties contemplating marriage may by contract settle the precise rights they are to have respectively in their own and each other's property during the coverture and the disposition of the property afterwards;<sup>101</sup> so, where parties married after agreeing that the wife should not have the right of dower, but only such property as was devised, the consideration of such contract being the permission to the wife to keep her small estate, the wife surviving the husband, the court sustained the settlement made previous to marriage and cut off her dower.<sup>102</sup> Contracts of this kind are called **marriage settlements**. They are legalized by statutes in some states by the requirements that their execution must be witnessed, and they must be acknowledged and accompanied with a schedule, and recorded. Failure to comply with the requirements of a statute does not affect the legal rights of the parties; the contract continues good as to creditors with notice; between the parties themselves, such a contract will be valid, though it be not recorded.<sup>103</sup> An antenuptial contract which is not to be enforced until after the marriage is determined is not extinguished by the marriage of the parties. In some states, debts due from parties who afterwards marry, are, by statutory provision, not extinguished by the marriage.<sup>104</sup>

**29. Postnuptial Contracts.**—The contracts of husband and wife made during the marriage are called postnuptial contracts; they are governed, generally, by the statutes of the various jurisdictions. At common law, husband and wife were unable to contract after marriage, generally, but either could make a conveyance of lands to the other through a third person as trustee.<sup>105</sup> The technical reasons of the common law arising from the unity of husband and wife, which would prevent his conveying the property directly to her for a valuable consideration, as upon a contract or purchase, have long ceased to operate in the

<sup>101</sup> 10 Ala. 400 (1846).

<sup>102</sup> 40 Conn. 169, 195 (1873).

<sup>103</sup> Mo. and Tex. Rev. Stats.; 1 Gratt. (Va.) 347 (1845); 115 Pa. 319 (1886).

<sup>104</sup> 49 Ind. 239 (1874); 91 Ky. 497 (1891); 29 Ind. 564 (1868); 32 Md. 214 (1869); 153 N. Y. 294 (1897).

<sup>105</sup> 15 Gray (Mass.) 322 (1860).

case of a voluntary transfer of it as a settlement upon her, and the intervention of a trustee in order that the property may be held as her separate estate beyond his control, though formerly indispensable, is no longer required. Unless existing claims of creditors are thereby impaired, a voluntary settlement of property made by a husband upon his wife is valid.<sup>106</sup> In equity, contracts made directly between husband and wife, if in good faith and on good consideration, may be enforced by the wife against the husband or by the husband against the wife.<sup>107</sup>

The wife may borrow from her husband to enable her to conduct her separate business, or prevent the sacrifice of her property, and, if she do so under an express contract, and there be neither fraud nor oppression nor any injustice, he is her creditor and she can be compelled to repay him. The relationship between the parties, however, exerts an important influence upon the contract of the wife. It is, doubtless, incumbent on the husband, when the wife borrows from him, to show an express contract and its consideration, as well as good faith and voluntary action; he could not recover without showing the purpose for which she obtained it.<sup>108</sup> Where a wife, by proper and sufficient evidence, establishes an indebtedness of her husband to her, she is entitled to the same remedies and has the same standing to enforce any security given for payment of the debt as any other creditor.<sup>109</sup>

The statutes which empower husband and wife to contract with each other, have, in some jurisdictions, certain restrictions; in other jurisdictions, the common-law disability has been entirely removed; in still others, the power is given to the wife to contract only so far as to manage her separate estate.<sup>110</sup>

**30. Illegal Contracts.**—Excepted from the statutory legal privilege granted to spouses to contract with each

<sup>106</sup> 101 U. S. 225 (1879).

<sup>107</sup> 2 Story Eq. Jur., Sec. 1,372.

<sup>108</sup> 117 Ind. 95 (1888).

<sup>109</sup> 121 N. Y. 219 (1890).

<sup>110</sup> 167 Mass. 211 (1897); 153 N. Y. 303 (1897); 102 Ind. 173 (1885); 54 N. E. Rep. 798 (1899).

other are contracts which are void as being without consideration and as being contrary to public policy. Thus, an agreement by the husband to pay his wife for her services as housekeeper is void as being contrary to public policy and without consideration.<sup>111</sup> Nor can the wife contract with her husband to labor in the field instead of in her household, such being an invalid contract for want of consideration;<sup>112</sup> and a contract by a wife with her husband to support the latter, in consideration of a conveyance of land to her by him, is illegal.<sup>113</sup> A contract between husband and wife, whereby the husband agrees to drop all matters of dispute and pay the wife a sum of money in consideration of her agreeing to drop all disputes, and to refrain from scolding, fault finding, and anger in the future, and, generally, to be peaceful, is void as against public policy.<sup>114</sup> In Pennsylvania, however, a contract is held to be valid between spouses, where the husband agrees to pay wages to the wife for extra and unusual services in the course of his business, as for services as cook in his restaurant, such services being outside of the family relations;<sup>115</sup> and, if a bond be given by a husband to the wife, contingent upon the husband not treating his wife kindly and not being faithful, such instrument is not void as against public policy, or as being without consideration, and, upon maltreatment of the wife by the husband, payment of the bond may be enforced by an action thereon.<sup>116</sup>

### CONTRACTS WITH THIRD PARTIES

**31.** The statutes which enable married women to have and to hold property, and which take away the husband's interest in her property, generally clothe the wife with power to contract with reference thereto.<sup>117</sup> In our illustrations, in preceding pages, of the prevailing type of these statutes, the ability of the wife to contract was necessarily mentioned.

<sup>111</sup> 106 Mich. 384 (1895).

<sup>112</sup> 52 N. Y. 371 (1873).

<sup>113</sup> 119 Ind. 138 (1888).

<sup>114</sup> 78 Iowa 177 (1887).

<sup>115</sup> 169 Pa. 292 (1895).

<sup>116</sup> 11 Atl. Rep. 438 (1887).

<sup>117</sup> 115 Mass. 374 (1874).

The taking from her of the disability to hold property, and the ability to contract, go hand in hand.

It is in the matter of the married woman's capacity to contract with third persons, or strangers to the marriage relation, that she has received by the enabling statutes her greatest advancement, be it ever so uncertain because of the variances in the statutes, and in the judicial construction thereof, in different jurisdictions. In some states, as has been seen, the legal reform in favor of married women has been carried to the extent of making the wife the equal of the husband in contractual capacity, as to matters, at least, connected with her separate property; and even as to property not strictly her separate property, the wife is nearly, if not quite, abreast with the husband in the matters of contracts in some jurisdictions under the statutes and the construction by the courts.

The right to contract carries with it the incurring of liability, the question of extent of the liability of one who contracts being the gauge of that one's power to contract. When it is viewed judicially, the contract of a married woman is generally considered with respect to her power to make herself liable and to charge her separate estate. Generally, a married woman may contract and bind herself and her estate and business by her contracts: (1) Where she engages in trade or business; (2) in the management of her separate estate; and (3) for necessities.<sup>118</sup>

**32. Business Engagements.** — A married woman who is engaged in any separate trade or business, by statutory privilege, may contract and incur liability for goods or materials to be used in such business; she is bound by such contracts as if she were unmarried.<sup>119</sup> The trade or business may be farming, sawing lumber, keeping a boarding house, or other business pursuit that is a continuing and substantial employment.<sup>120</sup> If her business be conducting a farm by which she supports herself and family, it is immaterial that the produce

<sup>118</sup> 132 Pa. 503 (1890).

<sup>119</sup> 117 Mich. 433 (1898); 132 Pa. 503 (1890).

<sup>120</sup> 126 Mass. 332 (1878); 125 Mass. 421 (1878); 40 Conn. 117 (1873).

is mainly consumed by the family and that only a small part of it is raised to be sold;<sup>121</sup> if she have contracted a debt for apparatus to run her sawmill, she will be bound by it.<sup>122</sup>

**33. Contracts Made on the Credit of the Wife's Separate Estate.**—It is claimed that the wife's equitable separate estate, and the equitable rules which govern it, remain unaffected by married women's statutes; that the modern statutes, in fact, have tended to change an equitable ownership into one that is legal. If a married woman, having separate property, enter into an engagement, which, if she were unmarried, would constitute her a debtor, and in entering into such an engagement she purport to contract, not for her husband, as his agent, but for herself, and on the credit of her separate estate, and it were so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable.<sup>123</sup> This is the English doctrine, the true reason of which is, that the liability of a wife's separate property is a mere equitable incident of her separate estate, which is itself a creature of equity.<sup>124</sup> The intent to contract is conclusively inferred from the form and nature of the kinds of engagements, including, at least, all those in the form of written instruments. Under the English cases, the wife's separate estate is liable for her contracts under seal, for her bills of exchange and promissory notes, for all her written engagements, and even for her verbal engagements and implied promises, if it appear that they were made with reference to and on the faith and credit of her separate property; and whether they be so made will be determined by a consideration of the surrounding circumstances.<sup>125</sup> In other words, although the wife's contract be in ordinary form, without mentioning or referring to her separate property, it is enforceable against such property, although her husband or a stranger may have joined with her in the

<sup>121</sup> 126 Mass. 332 (1878).

<sup>122</sup> 52 Miss. 171 (1876).

<sup>123</sup> L. R. 3 Eq. (Eng.) 781-787 (1866).

<sup>124</sup> Pom. Eq. Jur., Sec. 1,122.

<sup>125</sup> *Ibid.*, Sec. 1,124.



instrument.<sup>126</sup> The intent to contract on the credit of the wife's separate estate will be presumed where there appears to be no other means from which payment could be reasonably expected but such estate.<sup>127</sup>

**34.** The English doctrine has been accepted in the United States, but in some states there exist different modes of applying it, as before mentioned, and with regard to which there is a great variety of opinion. In a few states, the intent to contract on the faith and credit of the separate estate, to make it liable, must affirmatively and expressly appear, and will not be implied or presumed. In these states, the weight of opinion is that the wife has no power to charge her separate property for her contracts of suretyship made entirely for the benefit of another, but that to enforce such a contract there must be express or implied permission in the instrument creating the estate.<sup>128</sup> In other states, the English doctrine is substantially adopted, but the intent to make a wife's separate estate liable for her contract debts must expressly appear and will not be presumed, and when it does appear, the separate property is liable for (1) contracts made for its benefit, (2) contracts made for her own benefit, when they purport to be made on the faith and credit of the separate estate, and (3) contracts of suretyship for the benefit of another, if the intention to charge the separate property be clearly expressed.<sup>129</sup> In some states, the English doctrine is followed so closely that the intent to contract on the credit of the separate estate need not be expressed, but will be inferred from the nature or form of the contract; the separate estate is liable for contracts, of all kinds, although no intention to bind it be expressed.<sup>130</sup> In most of this last class of states, the wife's contracts of suretyship must be expressly charged upon her separate property in order to bind it, and her verbal

<sup>126</sup> 1 Bro. Ch. (Eng.) 16 (1778); 17 Ch. Div. 454 (1881); L. R. 6 Ch. (Eng.) 166, 728 (1877).

<sup>127</sup> L. R. 3 Eq. (Eng.) 781 (1866); 3 De G. F. & J. (Eng.) 494 (1861).

<sup>128</sup> 15 Gray (Mass.) 328 (1860); 112 Mass. 276, 575 (1873).

<sup>129</sup> 18 N. Y. 265 (1858); 68 N. Y. 329 (1877).

<sup>130</sup> 71 Ind. 159 (1880).

engagements must likewise appear in some affirmative manner to be made on its credit.<sup>131</sup> The statutes of some states require, that unless a married woman have a separate estate situate within the state, she is, as to her contracts, subject to her disability of coverture, and a creditor suing her there must aver that she has such an estate, and that his debt is a charge upon it, or ought to be paid out of it.<sup>132</sup>

**35.** Generally, a married woman has the same right under the statutes to enter into any contracts in reference to her separate property, as if she were unmarried. She may not only incur obligations on property which she already owns, but may bind herself by agreement for the acquisition of property to her separate use.<sup>133</sup> The proper implication from the statutes is, that as to her separate property and business she is virtually a *feme sole*, and may do whatever she could have done if she were unmarried.<sup>134</sup> The fact that her husband joins with her in her contracts and covenants is immaterial; it does not enlarge his interest in her estate, but merely makes him responsible with her.<sup>135</sup> Under the statutes in most states, she can dispose of any property which she owns as her separate estate without her husband's consent, save only that he must join in the deed of conveyance of real estate to pass his curtesy, in jurisdictions where tenancy by the curtesy has not been abrogated.<sup>136</sup> But in some states, restrictions are put on a married woman's power to encumber her statutory separate estate, as that she may mortgage it only to secure debts for the benefit of her estate, but, generally, a mortgage by a married woman of her statutory separate estate is binding upon her irrespective of the nature of the debt; still, in some states, a married woman cannot bind her statutory separate estate by a mortgage for her husband's benefit.<sup>137</sup>

**36.** Where a deed of conveyance settling real property on a married woman provides that the property is not to be

<sup>131</sup> 69 Ill. 214 (1873).

<sup>132</sup> 99 U. S. 325 (1878).

<sup>133</sup> 115 Mass. 375 (1874).

<sup>134</sup> 7 Allen (Mass.) 504 (1863).

<sup>135</sup> 115 Mass. 375 (1874).

<sup>136</sup> 2 Gray (Mass.) 447 (1854).

<sup>137</sup> 108 Ind. 301, 436 (1886); 22 Wall. (U. S.) 329 (1874); 33 S. C. 231 (1890).

sold, mortgaged, charged or encumbered by her, and that she is to have the property without any power of anticipation, she is restrained from disposing or charging it.<sup>138</sup> In Rhode Island, it is held that without words in the instrument restraining her, "the equitable estate of a married woman, in real property settled to her sole and separate use, is as alienable by her—she and her husband joining in the deed executed in solemn form under the statute—as her legal estate in real property."<sup>139</sup> In Pennsylvania, a married woman's power to charge her separate equitable estate did not formerly exceed the limits prescribed in the deed of settlement. The provisions of the Married Woman's Property Act of 1887, like those of the act of 1848, apply to the separate estate at law of a married woman, as distinguished from the separate estate which has existed in equity only; and an estate of the latter kind may still be created subject to the same rules of equity as heretofore. Nor do the provisions of those acts, taken together, have any effect upon the construction of an instrument such as would have been held, prior to the passage of those acts, to create an equitable separate estate; language which would have had that effect then, will have no different effect in an instrument executed since the passage of the acts.<sup>140</sup> Under the statutory powers given to a married woman in Pennsylvania, she may bind her separate estate by contracts which inure to the benefit of the estate, though not chargeable upon the separate estate.<sup>141</sup> In New York, as incident to the power of disposition given by the statutes of 1848 and 1849, a married woman may create an express charge on her separate estate held under those statutes, in the same manner as if she were a single woman.<sup>142</sup>

It seems that a married woman must be deemed to have benefited her separate estate by the performance of all the contracts she makes, and that she is liable to have them enforced against her.<sup>143</sup> And the courts have said that the

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<sup>138</sup> 12 Cl. & F. (Eng.) 204 (1845).

<sup>139</sup> 7 R. I. 413 (1863).

<sup>140</sup> 131 Pa. 476 (1889).

<sup>141</sup> 116 Pa. 28 (1887).

<sup>142</sup> 18 N. Y. 265 (1889).

<sup>143</sup> 22 Hun (N. Y.) 15 (1880).

statutes which change the common law must be held to be no further abrogated than the clear import of the language used in the statutes absolutely required, and they have hesitated to say, except in jurisdictions where very liberal legislation, like the Married Woman's Act of 1893 in Pennsylvania, exists, that a married woman may make contracts and bind her estate generally as a single woman.<sup>144</sup>

**37. Necessaries.**—Necessaries are such things as are proper and requisite for the sustenance of man, and include food, clothing, medicine, and habitation. The word *necessaries* is a flexible term in law, not absolute. It has relation in each case to the person's financial and social condition in life, and not merely to such things as are needful to sustain life; it includes many of the conveniences of refined society.<sup>145</sup>

The term has a more expressive meaning than the word necessary, and when used in connection with furnished articles, the term *necessaries* means such articles, services, or the like as the husband, considering his ability, ought to furnish his wife for the sustenance and the preservation of her health and comfort. The word necessary has only reference to the necessity of their being furnished.<sup>146</sup>

No absolute rule can be fixed which will determine what are necessaries in every case. What would be extravagant in one man's wife might be very economical in another. The best way to determine what articles of dress a discarded wife may supply herself with at the expense of her husband, is to ascertain what a prudent woman would expect and a good husband be willing to furnish, if the parties were living harmoniously together.<sup>147</sup> Considered in an absolute sense, the term *necessaries* includes food, drink, clothing, fuel, washing, medical attendance (including medicine, medical advice, and reasonable expenses during illness), and a suitable habitation, or lodging; whatever, in fact, is requisite for the decent and comfortable support of the wife.<sup>148</sup>

The situation or social station of the parties, taken in

<sup>144</sup> 49 Hun (N. Y.) 381 (1888); 132 Pa. 503 (1890).

<sup>147</sup> 23 Pa. 160 (1854).

<sup>145</sup> 7 S. & R. (Pa.) 247 (1821).

<sup>148</sup> 40 Conn. 76 (1873).

<sup>146</sup> 114 Mass. 429 (1847); 47 Minn. 250 (1891); 50 Ill. App. 27 (1892).

connection with the earning capacity of the husband, and the style of living and expenditure in the circle in which the husband places the wife, are all taken into consideration in fixing what are necessities; so that, in some cases, domestic services may be included in necessities, while in others these would not be regarded as necessities compatible with the situation and condition of the parties and their surroundings. Whether articles sued for were necessities or not, is a question of fact, to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively that certain articles are not necessities.<sup>149</sup>

Under certain circumstances, counsel fees are claimed under the head of necessary expenditures in behalf of the wife, for which the husband is liable; as where the payment of such fees is necessary for her sustenance or protection, whether the necessity be caused by the husband's conduct or from other cause; or where the wife is charged with a crime and legal services are rendered; or where legal services are rendered to the wife, necessitated by her application to the law for protection from her husband's act.<sup>150</sup>

**38. The Husband's Liability for Necessaries.**—The husband is liable for necessities, furnished under his own direction and management, which do not go beyond what is needed to provide the wife with a proper living for her station, commensurate with his capacity to earn and provide.<sup>151</sup> The husband must support his wife himself, or pay those who support her in a reasonable manner.<sup>152</sup> This liability is based on the marital relation, from which springs the husband's duty to provide for the wife. It rests, also, upon the principle of the wife's agency, at common law, in contracts made by the wife.<sup>153</sup>

The liability of the husband arises as well where the parties live together as where the wife lives separate from

<sup>149</sup> 32 Mich. 212 (1875); 41 Am. Rep. 279 (1881); 114 Mass. 429 (1874), citing 12 Cush. (Mass.) 512 (1853); 47 Minn. 250 (1891).

<sup>151</sup> 117 Pa. 81, 248 (1887).

<sup>152</sup> 7 S. & R. (Pa.) 247 (1821).

<sup>153</sup> 28 Mo. App. 155 (1887).

<sup>150</sup> L. R. 3 Ex. (Eng.) 63 (1868); 50 Ill. App. 27 (1892); 18 B. Monr. (Ky.) 514 (1857).



the husband, under certain circumstances. Where they live together, there is a presumption arising from cohabitation, that what the wife purchases as necessities are such and are rightfully purchased by her, and it is not incumbent on one who supplies her in good faith to inquire into her right to purchase them. Therefore, it is for the husband to prove that the goods, if he complain of their purchase, were not furnished by his authority.<sup>154</sup> The provision of necessities to the wife is under the husband's own management and direction, and the wife can interfere only at her cost.<sup>155</sup> The duty only implies, however, that he is bound to furnish them at the mutual home of both and not elsewhere. And, the husband has the right to prohibit persons from trusting or dealing with the wife on his account, but such notice must be brought home to the parties for whom it is intended; and it must be properly given; if it be simply published in the newspapers, it will not avail against those who have not received actual notice.<sup>156</sup> By proper notice the husband withdraws the agency which the law gives to the wife during cohabitation to purchase necessities. Where necessities are furnished despite such notice, the tradesman who sells them does so at his peril, and the burden of proof is on him to show that the goods furnished are in the class called necessities, that they are needed for present use in the family, and that on account of the husband's neglect to furnish necessities, the wife could not be supplied therewith and must suffer for the want thereof.<sup>157</sup> Where the husband neglects to supply his wife with necessities, or the means of procuring them, she may pledge his credit for them, and the husband cannot, by notice to the vendor of necessities, divest the wife of the power of purchasing them, if it appear that the articles were necessities and the husband have failed to supply them. He must supply her if he desire to terminate the power to pledge his credit which his neglect has given her.<sup>158</sup>

<sup>154</sup> 2 B. & C. (Eng.) 631 (1825); 3 Car. &

P. (Eng.) 15 (1827).

<sup>155</sup> 20 Tex. 141 (1857).

<sup>156</sup> 37 Mich. 563 (1877).

<sup>157</sup> 43 Vt. 330 (1871).

<sup>158</sup> 49 Conn. 450 (1881); 25 Ill. 414 (1861); 49

Conn. 450 (1881).

**39.** Where the wife is living separate from the husband, there is no presumption that she has authority to purchase necessities, and one who furnishes them, to render the husband liable for them, will be required to establish special circumstances, such as will make the husband responsible.<sup>159</sup> The husband will be liable for the necessities if he abandon his wife, or turn her away from their habitation without just cause, or by cruel treatment compel her to withdraw from her home. In such cases, the wife's right to necessities remains, and the vendor of them may recover against the husband for the same; the wife still has, under such circumstances, the right to act as the husband's agent to procure necessities.<sup>160</sup> And where a woman whose husband is able to support her is driven from her home by his cruelty and becomes a township or county charge, the money expended for her support may be recovered of the husband at the suit of the party making the advances.<sup>161</sup> A sincere offer on the part of the husband, who has abandoned his wife, to take her back, live with and provide for her, will operate to release him of liability for necessities, if the wife refuse the offer. By such refusal she loses her right to pledge his credit for necessities.<sup>162</sup>

The husband's liability for necessities will cease if he abandon the wife on account of her extreme cruelty, or for misbehavior which would give him cause for a divorce; or if she leave their habitation against his will and without good cause, and, generally, if she be the cause of the separation and refuse offers in good faith for a reconciliation, because he is liable for necessities elsewhere than in the mutual home only when she is obliged to take up her lodging place elsewhere than their habitation for causes given by the husband.<sup>163</sup> To justify a wife in deserting her husband, the cause must be grave and weighty. It must be of the same character which would constitute a legal ground for divorce.<sup>164</sup>

<sup>159</sup> 25 Ill. 414 (1861); 7 W. & S. (Pa.) 83 (1844).

<sup>160</sup> 8 Gray (Mass.) 172 (1857); 163 Pa. 647 (1894).

<sup>161</sup> 10 Ohio 365 (1841).

<sup>162</sup> 31 N. H. 311 (1855).

<sup>163</sup> 65 N. H. 185 (1889).

<sup>164</sup> 25 Ill. 414 (1861).

If she have voluntarily and without cause left him, and voluntarily return and offer to take up her abode with him again, provided her conduct have been good during her absence, he is bound to receive her and provide for her, or he will be responsible for her necessities elsewhere; if he refuse to receive her, it is the same as if he turn her out of doors.<sup>165</sup> The husband, however, is under no obligation to take the wife back to his protection and support, if she have eloped and add to that misconduct the crime of adultery, or if a separation have been caused by adultery. Such acts relieve him of liability for necessities, and his refusal to take her back will not revive the obligation of support; but the husband's liability would not be relieved if her wrong doing have been connived at by him, or induced by similar wrong doing on his part.<sup>166</sup>

40. Where there is a separation by agreement, by the terms of which the husband makes a suitable allowance for the wife's support, he cannot be held liable for the debts she contracts for necessities; whether the amount of the allowance be a competent provision depends on the station in life of the parties, the income of the husband, and the circumstances of each case.<sup>167</sup> Where there is a separation by mutual consent and no allowance is made for the wife, her right to pledge her husband's credit for the necessities will be presumed, and he is liable for her necessities.<sup>168</sup>

Statutes in some states place the liability for necessities on the wife without releasing the husband. In some states, the property of both or either is chargeable with family expenses, no matter by whom they are contracted, thus virtually declaring the old law unimportant, as to the agency of the wife in binding the husband in ordinary domestic matters.<sup>169</sup> Generally, under the statutes that

<sup>165</sup> 5 Man. & Gr. (Eng.) 624 (1843); 2 Stra. (Eng.) 1,214 (1795); 11 Johns. (N. Y.) 281 (1814).

<sup>166</sup> 6 T. R. (Eng.) 603 (1796); 4 B. & Ald. (Eng.) 252 (1821); L. R. 1 C. P. (Eng.) 583 (1866); 19 Q. B. Div. (Eng.) 379 (1887).

<sup>167</sup> 47 Hun (N. Y.) 324 (1888); 8 C. & P. (Eng.) 717 (1838).

<sup>168</sup> 69 Ill. 569 (1873); 6 B. & C. (Eng.) 200 (1827).

<sup>169</sup> 73 Pa. 332 (1873); 103 Pa. 396 (1883); 40 Ill. App. 380 (1891).

enable married women to contract, the husband's liability for the wife's contracts for necessities still remains, except where there are express contracts on her part to charge her separate estate, or it clearly appears that she assumes liability for the necessities exclusive of the husband's liability. In such case, where the wife makes an express contract for the necessities, she does not act as agent for the husband and there is no implied agreement on the part of the husband that he is responsible.<sup>170</sup> In jurisdictions where statutes empower a married woman to contract debts as *feme sole*, a married woman may bind herself personally, or her separate property, for necessities by express contract, and the husband will not be liable for necessities so contracted for, by implication as her principal, or primarily, nor will he be bound with her, unless he agree to be so bound by express or implied words of contract.<sup>171</sup>

#### LIABILITY FOR TORTS AND CRIMES

**41. For the Wife's Torts.**—At common law, the wife is incapable of being sued, and for this reason the liability for her torts, committed either before or after marriage, is placed on the husband. The doctrine extends to torts of all kinds whether committed as executrix, administratrix, guardian, or trustee.<sup>172</sup> In some of the United States, the liability of the husband is abrogated by statutes, which remove the husband's liability for the wife's torts, except where they are committed by his direction or authority. In some jurisdictions, the married women's statutes are judicially construed to the effect that the husband is not liable for the wife's torts committed by her in the management and control of her separate estate.<sup>173</sup> Modern legislation is construed as operating to entirely change the rights in the wife's property from being absolutely the husband's, by

<sup>170</sup> 26 Mich. 179 (1872); 165 Pa. 294 (1895); 84 Hun (N. Y.) 199 (1895).

<sup>171</sup> 9 L. R. A. 212 (1890); Pa. Act of 1893, P. L. 394; 64 Hun (N. Y.) 90 (1892); 22 N. Y. 494 (1878).

<sup>172</sup> L. R. 20 Eq. (Eng.) 324 (1875); 2 Binn. (Pa.) 43 (1813).

<sup>173</sup> 47 Mich. 571 (1882); 118 Mass. 58 (1875); 120 Mass. 89 (1876); 66 Ind. 196 (1879); 135 N. Y. 209 (1892).

the right of marriage at common law, to the wife's ownership in all kinds of property under the married women's property acts. Thus the cause, or reason, being removed, because under the old procedure the wife, owning nothing, could not respond in damages for her torts, the effect is removed also.<sup>174</sup>

By statute in England and some of the United States, the wife may be sued alone for torts committed during coverture. In England, the injured party has the option to sue both husband and wife, or the wife alone.<sup>175</sup> Where the wife commits a wrong in a fiduciary capacity, as trustee or executrix, she is liable as a *feme sole*, whether the wrong be committed before or after marriage. The husband's liability for the wrong doing of the wife as executrix is removed by the Married Women's Property Act, 1882, unless he intermeddle with the administration of the estate.<sup>176</sup>

In the United States, in jurisdictions where statutes provide that by marriage the powers of an executrix shall cease, the wife's liability for the waste of an estate, during coverture, is removed. For the joint torts of both, the husband and the wife may be jointly sued, as for trespass. But, if the wife have acted under his coercion, or if the tort be such that it could not have been a joint act, they cannot be sued jointly; and they cannot be jointly sued for slander committed by both. Where they jointly convert the property of a third person to their own use, they may be jointly sued therefor; or the action may be brought against the husband alone.<sup>177</sup>

**42. For the Wife's Crimes.**—By the common rule, the husband is liable for prosecution for crimes committed by the wife at his direction. This rule has not been changed by modern legislation.<sup>178</sup> Where the wife violates the law by selling intoxicating liquors on premises belonging to her as

<sup>174</sup> 65 Ill. 129 (1872); 78 Ill. 40 (1875); 100 Ky. 138 (1896).

<sup>175</sup> 17 Q. B. Div. (Eng.) 177 (1886); 120 Mass. 80 (1876).

<sup>176</sup> M. W. Prop. Act, 1882, 45 & 46 Vic., c. 75.

<sup>177</sup> 121 Mass. 259 (1876); 4 Bing. N. C. (Eng.) 96 (1837); 44 Ill. 42 (1867); 15 Gray (Mass.) 535 (1860); 2 Dana (Ky.) 238 (1834).

<sup>178</sup> 1 Cranch (U. S.) 571 (1809); 115 Mass. 146 (1874).



her own separate property, which is also the family domicile, the rule that the husband is liable holds good. But, as a general rule, the husband is not liable for the wife's crimes committed in his absence or against his will and contrary to his instructions. The law will, however, imply that the wife's criminal act is done with his consent, if done in his presence or with his knowledge.<sup>179</sup>

A married woman is not protected in the commission of a crime merely by reason of the marriage state. She is protected under the principle of matrimonial subjection if she commit a crime by the husband's coercion. Presumption of coercion is raised by his presence when the crime is committed by her, and his actual presence is essential to constitute coercion. He is considered to be present within the meaning of the law if he be near enough to the wife to influence her, or if he be on the premises and near at hand; his momentary absence would still leave the wife under his influence.<sup>180</sup> When both are charged with an offense, and coercion on the part of the husband does not exist, they may be jointly indicted and tried, or the wife may be indicted and tried separate from the husband.<sup>181</sup>

#### THE AGENCY RELATION

**43.** Husband and wife may act in the capacity of agent for each other. By virtue of his marital rights alone, the husband, at common law, has authority to act as the wife's agent under circumstances of necessity; for, at common law, a married woman cannot appoint another to act in her place.<sup>182</sup> But in the United States, it is held that the husband's agency is not to be inferred from the marital relation alone; there must be acts on his part which give notice to the public that his authority is from the wife, in order to bind her by his acts.<sup>183</sup>

<sup>179</sup> 115 Mass. 146 (1874); 71 Mo. 475 (1880);  
126 Mass. 462 (1879).

<sup>180</sup> 82 N. Y. 233 (1880); 8 C. & P. (Eng.) 19  
(1837); 103 Mass. 71 (1869); 140 Mass.  
454 (1886); 97 Mass. 593 (1867).

<sup>181</sup> 82 N. Y. 233 (1880).

<sup>182</sup> 31 Miss. 46 (1856).

<sup>183</sup> 114 U. S. 435 (1884); 78 Pa. 55 (1875); 89  
N. Y. 286 (1882).

Under the married women's enabling statutes, the wife may act not only for herself by herself, but also by an agent, and may appoint her husband or other person to act as her agent. So far as she is able to contract, a married woman may contract in person or by an agent.<sup>184</sup> The general rule is that where the wife is capable of acting for herself, and is *sui juris*, she may appoint her husband her agent to act for her and she is not prohibited from so doing by the marriage relation.<sup>185</sup> If she be possessed of a separate estate and engaged in a separate business, the wife may employ her husband as agent to carry on the business, and may agree to compensate him for his services.

The wife may act as agent for the husband, there being nothing in the marriage relation to prevent her from so acting. She derives no authority to act as the husband's agent from the marriage relation; she must be *in fact* the agent of the husband in order to bind him by her acts.<sup>186</sup> This agency is of two kinds: (1) That which the law creates as the result of the marriage relation, called "agency of necessity," by virtue of which the wife is authorized to pledge the husband's credit for the purpose of obtaining those necessities which the husband himself has neglected or refused to furnish, and (2) that which arises from the authority of the husband, expressly or impliedly conferred, as in other cases.<sup>187</sup> She acts as agent by implication, where her husband has assented to similar dealings of the wife, had on previous occasions; or her agency may arise by general consent of the husband, or by subsequent ratification, as where she has done an act during his absence which he did not disavow on his return.<sup>188</sup>

<sup>184</sup> 71 Ind. 159 (1880).

<sup>185</sup> 6 Neb. 377 (1877); 99 Ind. 469 (1884);  
123 N. Y. 568 (1890); 113 Pa. 209 (1886);  
117 Mich. 433 (1898).

<sup>186</sup> 11 Vt. 628 (1839).

<sup>187</sup> 41 Minn. 250 (1891).

<sup>188</sup> 28 Vt. 241 (1856); 43 Vt. 314 (1871); 53  
Pa. 271 (1866); see *The Law of Agency*.

# THE LAW OF DIVORCE

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## INTRODUCTION

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### DEFINITION AND NATURE

1. **Divorce** is the dissolution or partial suspension by law of the marriage relation.<sup>1</sup> It is the act by which the state, acting through its legislative or its judicial department, either dissolves or merely suspends a marriage. Divorces, therefore, with reference to their source are (1) legislative, or such as are granted by a special act of the legislature, and (2) judicial, or such as are decreed by a court acting under general laws. With reference to their operation and effect upon the marriage relation, divorces are (1) absolute, or such as altogether dissolve and put an end to the marriage, being termed also divorces *a vinculo matrimonii*—from the bond of matrimony—and (2) limited, or such as leave the marriage itself in full force, but decree that the parties shall live apart, being also termed divorces *a mensa et thoro*, or divorces from bed and board. In Canada, limited divorces are known as *separations de corps*.

In the popular mind, the term divorce includes all the methods of judicial disunion of a husband and wife, being frequently applied to a sentence of nullity of marriage. A sentence of nullity, however, is a different thing from a decree of divorce; for, while the latter is a dissolution of the bands which once united the parties in a lawful marriage, the former is a declaration that a marriage pretended or supposed to be valid was in fact an invalid or unlawful marriage from the beginning.<sup>2</sup> A decree of divorce operates

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<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> 55 Me. 21 (1867).

from the time it is rendered, but a sentence of nullity relates back to the time when the marriage relation was assumed. A decree of absolute divorce destroys all inchoate property rights, such as dower, and all other rights depending upon the continuance of the relation, but preserves vested rights, such as were provided by an antenuptial settlement.<sup>3</sup> On the other hand, a sentence of nullity, as it pronounces the marriage inherently invalid from its commencement, so it ignores all rights and interests alleged to have sprung from a relation spurious in its origin.<sup>4</sup> Modern legal usage now confines the significance of the term divorce to a total dissolution of the bond of matrimony.<sup>5</sup> A divorce *a mensa et thoro* is commonly called a legal separation, wherein provision is usually made for the support of the wife and for the custody of the children.<sup>6</sup>

## HISTORY OF DIVORCE

2. Jurisdiction of all matrimonial causes belonged originally to the temporal courts.<sup>7</sup> In Roman jurisprudence, divorce causes were heard and determined by the civil magistrates.<sup>8</sup> In English history from a remote period, probably before the reign of Edward the Confessor, the ecclesiastical courts have assumed exclusive jurisdiction over all matters pertaining to marriage, on the ground that marriage was a sacrament and not within the control of the civil authorities. These ecclesiastical courts were church courts, the judges being church officials who received their commissions directly from the church, and indirectly from the king as the head of the church. It was a dogma of the church that marriage was a divine institution, not to be dissolved by divorce except by decree of the pope. Accordingly, for a long period, the ecclesiastical courts would grant no divorces *a vinculo matrimonii*, but only divorces *a mensa et thoro*, which, proving insufficient restraints upon the

<sup>3</sup> 81 Ill. 465 (1876).

<sup>4</sup> 4 Barb. (N. Y.) 303 (1848).

<sup>5</sup> Bouv. Law Dict.

<sup>6</sup> *Ibid.*

<sup>7</sup> 4 Johns. Ch. (N. Y.) 343 (1820), quoting Chancellor Kent.

<sup>8</sup> 67 Cal. 191 (1885).

commission of grave offenses against the marriage relation, caused the greatest pressure to bear on the church to grant absolute divorces. This was finally accomplished, but with certain restrictions or limitations. The church only consented to grant absolute divorces for canonical causes, such as consanguinity, affinity, and impotence, and for such other causes, such as prior existing marriage, mental incapacity, want of age, and the like, as rendered the marriage invalid from the beginning.<sup>9</sup> These divorces were in fact not the dissolution of lawful bonds of matrimony, but sentences of nullity of invalid marriages which were supposed or pretended to be valid. At a later date, parliament, upon exceptional occasions, granted absolute divorces for adultery committed after the marriage.

Such was the condition of divorce jurisdiction in England down to the time of the American revolution, when the colonists forsook the mother country, taking with them so much of the English common law, of which the ecclesiastical law was part, as was applicable to their new situation. Whether the colonists, in taking with them the common law of England, did not also import into the colonies (even though they did not actually erect into institutions) the ecclesiastical courts which alone in England could grant divorces, is questioned. The affirmative of this view has been taken by some authorities,<sup>10</sup> but the better opinion is that the divorce laws in the United States have always been, in their origin, purely statutory.<sup>11</sup>

**3.** In England, for a long time previous to the year 1858, a divorce *a vinculo matrimonii* could not be obtained in a court of law, but only by act of parliament. In that year there was constituted the court for divorce and matrimonial causes, to which was transferred all the jurisdiction formerly exercised by parliament in the granting of divorces, as well as all jurisdiction theretofore vested in the ecclesiastical courts. By the Judicature Act of 1873, jurisdiction

<sup>9</sup> 1 Nels. Div., p. 21.

<sup>11</sup> 39 Wis. 167 (1875).

<sup>10</sup> 1 Johns. Ch. (N. Y.) 488 (1815), quoting Chancellor Kent.



in divorce matters was exclusively vested in the probate and divorce division of the high court of justice, whence an appeal now lies to the court of appeal.<sup>12</sup> Since 1858, divorces *a mensa et thoro* have not been granted in England under that name. There was substituted in their stead, by statute,<sup>13</sup> judicial separations, which have the same force and the same consequences as a divorce *a mensa et thoro*. By a statute passed in 1878, if any husband be convicted of an aggravated assault upon his wife, the court or magistrate before whom the conviction is had may make an order that the wife shall no longer be bound to cohabit with her husband, and such order has all the force and effect of a decree of judicial separation. Since 1858, there have been no applications for private parliamentary divorces by married persons domiciled in England, but in 1886 a private enactment was obtained by an Irish lady, and there is still provided a procedure for bills of this nature in Irish and other cases.<sup>14</sup>

4. In the United States, as has been seen, the better opinion is that the divorce jurisdiction is, in its origin, purely statutory. The federal courts have never been invested by statute with jurisdiction, and, therefore, take no cognizance of divorce cases. Marriage is not regarded as a national concern, but a domestic relation within the control of the several states. It has even been questioned whether congress could constitutionally vest divorce jurisdiction in the federal courts to the exclusion of the jurisdiction of the courts of the several states.<sup>15</sup> There is, nevertheless, a widespread and increasing public sentiment in favor of the passage of a uniform divorce law in the United States. There are at the present time about forty-six different codes and thirty distinct causes for divorce.

The state courts have supreme and absolute power, within their own territorial limits, in all matters affecting divorce. Each state is sovereign over its own inhabitants, and has

<sup>12</sup> Bouv. Law Dict.

<sup>13</sup> 20 & 21 Vict. (1857), c. 85.

<sup>14</sup> Gemm. Div. in Canada, p. 15.

<sup>15</sup> 10 How. (U. S.) 82 (1850).

exclusive power, through its legislature, to fix the domestic policy of its people, including the subject of marriage. This results from the consideration that marriage is universally regarded, not as a mere personal relation or contract, although it comes into existence in pursuance of a contract, but as a status or legal condition established by law involving not merely the well-being of the parties, but also the highest interests of society and the state, and having more to do with the morals and the civilization of a people than any other institution.<sup>16</sup> Being a public institution, involving the good conduct of society, it comes within the protection of the public policy which governs and regulates the laws of every state.<sup>17</sup> A state, which has the power thus to create and regulate the relation and status of married persons, has the like power, in the absence of constitutional restrictions and with a due regard to property rights already vested, to alter or dissolve the relation. It follows, since marriage is not simply a personal contract nor a vested right, that a law which dissolves the marriage relation does not fall within the constitutional prohibition against the impairment of the obligation of contracts.<sup>18</sup>

The divorce jurisdiction of each state is wholly statutory,<sup>19</sup> and the agencies for granting divorces are either the legislature or the courts of law. A legislative divorce is a special act of the legislature, but it has all the effects of a decree of divorce. Legislative divorces were formerly common in the United States, but are now of little interest, having been abolished in the states of Alabama, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, West Virginia, and Wisconsin.

5. Judicial divorces are now almost universal in the United States, the legislature of each state vesting in its

<sup>16</sup> 63 N. W. Rep. 83 (1895); see *The Law of Husband and Wife: The Marriage Relation*.

<sup>17</sup> 9 Ind. 37 (1857).

<sup>18</sup> 63 N. W. Rep. 85 (1895).

<sup>19</sup> 14 Pick. (Mass.) 181 (1833).

courts of equity, or in courts having equitable powers, exclusive jurisdiction in all matters pertaining to divorce. The causes for divorce are usually enumerated by statute, and where this is done, all other causes, except perhaps such as render the marriage void from the beginning, are excluded.<sup>20</sup> Where the legislature confers divorce jurisdiction, but no causes for divorce are named, the jurisdiction of the courts is limited to such causes as were grounds for divorce in the old English ecclesiastical courts.<sup>21</sup> The time within which the petitioner must have resided in the state before commencing his action, as also the particular county in which suit must be brought, are usually specifically prescribed. Such statutes are generally framed upon the theory that jurisdiction of the action depends on the domicil of the parties, and, in particular, the domicil of the party applying; yet, in some states, the jurisdiction is made to depend upon such other facts as the place where the marriage was celebrated, the place where the offense was committed, the domicil at the time of the marriage, or the domicil when the offense was committed. Absolute divorces are granted in all the states except South Carolina, where no divorces of any kind are granted, being prohibited by the state constitution.<sup>22</sup> Limited divorces are granted in many of the states, are abolished in others, and are generally considered to be of questionable wisdom and efficacy. They give some measure of protection to defenseless wives of drunkards and ruffians, but the parties, being still husband and wife, are exposed to great temptations to commit adultery. The parties themselves sometimes change their marital relations, for there is no law which prevents their giving up the right of cohabitation and living apart by mutual consent. Contracts are entered into stipulating conditions, property rights, and obligations, thus modifying the legal relation of husband and wife. These are called deeds of separation, and form no bar to a subsequent action of divorce, except where the cause alleged is desertion, in which case they affirmatively

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<sup>20</sup> 1 Paige Ch. (N. Y.) 276 (1828).

<sup>21</sup> 15 Ill. 120 (1853).

<sup>22</sup> 12 S. C. 29 (1879).

establish that the separation was by mutual consent; although the case is altered, and desertion is established, where one of the parties expressly repudiates the deed of separation, and, in good faith, offers to return to cohabitation with the other.<sup>23</sup>

6. In Canada, no mention of divorce occurs in the legislative annals until 1833,<sup>24</sup> prior to which time there was no substantive divorce law in England. In 1833, a bill was introduced in the assembly of Upper Canada "to enable married people to obtain divorce in certain cases," but the measure was dropped before second reading. In 1839, a divorce was granted by the same legislature, but from 1845 to 1867 only three similar bills were passed, and these only by narrow majorities and with the hostile opposition of the Roman Catholic legislators. In 1867, by the British North America Act, which conferred a new constitution upon the Dominion of Canada, exclusive jurisdiction in divorce matters was given to the Canadian parliament, which has ever since exercised authority on the subject over the dominion. The parliament has not yet repealed statutes which were in force at the time of the entry into the federal union of the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, and, in these provinces, certain judicial tribunals still continue to grant divorces.<sup>25</sup> During the twenty years from 1868 to 1888, these provincial courts granted one hundred and nine divorces. In the same period, the Canadian parliament granted but twenty-five divorces.<sup>26</sup>

### CAUSES FOR DIVORCE

7. Causes for divorce are everywhere recognized to be of two kinds: (1) Such as existed at the time of the marriage, and which render it void or voidable, called *canonical causes*, and (2) such as have arisen since the marriage, which may be said to be by far the most prolific grounds for divorce.

<sup>23</sup> 33 N. J. Eq. 661 (1880).

<sup>24</sup> Gemm. Div. in Canada, p. 17.

<sup>25</sup> *Ibid.*, p. 33.

<sup>26</sup> *Ibid.*, p. 257.

## CANONICAL CAUSES

8. This class includes causes such as render the parties, or one of them, unfit or incompetent for the marriage relation, and are of canonical or ecclesiastical origin. Strictly and technically they are causes for nullity of the marriage, but in many of the United States are frequently included in the statutory causes for divorce. They are: *Non-age, mental incapacity, physical incapacity, consanguinity and affinity* within prescribed degrees, *prior existing marriage*, and *marriage by mistake or fraud*. For these causes, it is believed, divorces may be had everywhere.

The English Matrimonial Act of 1858 expressly authorizes the divorce court to grant relief on principles which shall conform as nearly as may be to the principles on which the ecclesiastical courts formerly acted; and the same is true of the British North America Act of 1867 regulating the subject of divorce in Canada. In the United States, as has been seen, these causes are frequently to be found among the statutory causes for divorce. These canonical causes are briefly considered.

9. **Non-Age.**—Non-age is want of age. A person under seven years of age is incapable of marriage, and at common law his marriage was absolutely void.<sup>27</sup> The marriage of a male between seven and fourteen, or of a female between seven and twelve, is voidable.<sup>28</sup> The age of puberty was by the common law fixed at twelve in females and at fourteen in males, and, therefore, the marriage of a male over fourteen or of a female over twelve, was held to be valid.<sup>29</sup> In most of the United States, the statutes prescribed the age at which a party may marry, and the marriage of a party under the statutory age is generally held voidable.<sup>30</sup> In some of the states, the common-law rule still exists,<sup>31</sup> while in others, the ages of eighteen for males and fourteen for females,<sup>32</sup> or sixteen for males and fourteen for females, are adopted.

<sup>27</sup> Bish. Mar. & D., Vol. 1, Sec. 147.

<sup>28</sup> 55 Ala. 108 (1876).

<sup>29</sup> 21 Barb. (N. Y.) 439 (1856).

<sup>30</sup> 55 Ala. 108 (1876).

<sup>31</sup> 21 Barb. (N. Y.) 439 (1856).

<sup>32</sup> 20 Ohio 1 (1851); 7 Jon. (N. C.) 194 (1859).



**10. Mental Incapacity.**—The marriage of a person who is insane is void at common law. By statute, in many of the United States,<sup>33</sup> insanity is made a cause for divorce. In general, to constitute a cause for divorce, the insanity must have existed at the time of the marriage. Insanity arising after marriage is rarely a cause for divorce,<sup>34</sup> though it is expressly made so by statute in some of the United States.<sup>35</sup>

**11. Physical Incapacity.**—The marriage of one who is sexually impotent is voidable at common law, but not void. Most of the states have, by statute, declared impotence a cause for divorce. To be a cause for divorce, the impotence must be incurable, and must amount to an inability to copulate, and not merely an inability to reproduce children,<sup>36</sup> for mere barrenness or sterility is no ground for a divorce, unless expressly made so by statute. The inability to copulate need not in all cases consist of a structural malformation, but a physical defect will be sufficient, if the result be to render sexual intercourse impossible except in an incomplete or unnatural manner. A divorce was granted where the man was impotent as to his wife, though of full powers as to other women;<sup>37</sup> and a divorce was granted to a man where all attempts at intercourse caused hysteria in the woman.<sup>38</sup>

The defect must have existed at the time of the marriage; for, if it arise afterwards, though from causes existing at that time, it is no ground for divorce.<sup>39</sup> It must have been unknown, at the time of the marriage, by the party complaining, and parties marrying late in life are presumed to know of defects peculiar to age, and cannot complain merely of such defects as are natural in persons of like age.<sup>40</sup> Unreasonable and unexplained delay in making the complaint may prove a bar to the suit, and the validity of such a marriage can only be questioned in the lifetime of the parties, and by the party suffering an injury from it.<sup>41</sup>

<sup>33</sup> Stats. Fla., Ga., Miss.

<sup>34</sup> 66 Ill. 87 (1872); 43 Iowa 534 (1876).

<sup>35</sup> Ark. Stat. (1874).

<sup>36</sup> 1 Rob. Ecc. (Eng.) 279 (1845).

<sup>37</sup> 1 Spinks (Eng.) 389 (1854).

<sup>38</sup> L. R. 3 P. & D. (Eng.) 126 (1873).

<sup>39</sup> 18 Kans. 371 (1877).

<sup>40</sup> 28 N. J. Eq. 34 (1877).

<sup>41</sup> 37 L. J. Mat. Cas. (Eng.) 80 (1868).

The proof of impotence in either party usually consists of the reports of medical men who have either been voluntarily chosen by the parties or specially assigned by the court on the application of the injured party to make a physical examination. The courts have power, independently of statute, to make a compulsory order for such examination,<sup>42</sup> and the only available ground for refusing to submit to such order appears to be the old age of the party at the time of the marriage.<sup>43</sup> The evidence of such experts, together with the report of their conclusions, is not conclusive of the question, but is given due consideration by the court; and if after a due probation (by the English ecclesiastical law three years was given)<sup>44</sup> consummation have not been accomplished, a presumption of impotence is raised.<sup>45</sup>

**12. Consanguinity and Affinity.**—Consanguinity is the relation or connection of persons descended from the same stock or common ancestor. Affinity is the relation of persons which results from marriage.<sup>46</sup> Consanguinity is a canonical or ecclesiastical, and not a common-law, disability,<sup>47</sup> and as a cause for divorce finds its sanction, not only in Scripture,<sup>48</sup> but in the teachings of physiology.<sup>49</sup> Affinity, in its origin, appears to have been founded only in superstition and ignorance.<sup>50</sup> Modern statutes now generally regulate the degrees within which parties may or may not marry. The table given in another title is a fair sample of these statutes founded on the old ecclesiastical law.<sup>51</sup>

**13. Prior Existing Marriage.**—The marriage of a person already married is void at common law, and though the statutes of most states expressly make this a cause for divorce, the object of such statutes is merely to establish a tribunal for determining the validity of the second marriage.

<sup>42</sup> 35 Vt. 365 (1862).

<sup>43</sup> 28 N. J. Eq. 34 (1877).

<sup>44</sup> 2 Rob. Ecc. (Eng.) 279 (1850).

<sup>45</sup> 2 Lee (Eng.) 578 (1730).

<sup>46</sup> Cent. Dict.

<sup>47</sup> 44 Pa. 309 (1863).

<sup>48</sup> Leviticus, c. xviii.

<sup>49</sup> Bish. Mar. & D., Vol 1. Sec. 313.

<sup>50</sup> Whart. Conf. L., Sec. 145.

<sup>51</sup> See *The Law of Husband and Wife: Competency of Parties, Consanguinity and Affinity.*

In general, the innocence of one party will not make the second marriage any the less void, though provision is usually made by the statutes for preserving the legitimacy of children born to the second marriage. A second marriage is not only a cause for divorce, but in many jurisdictions subjects the parties to the penalties prescribed for bigamy.

**14. Marriage by Mistake or Fraud.**—A marriage entered into through fraud, mistake, or duress, as it lacks the element of mutual consent requisite to the validity of every marriage, is void at common law, and may be so decreed independently of any statute.<sup>52</sup> By statute, in many states, fraud and coercion are expressly made causes for divorce. In some states, under such statutes, a divorce may be had where the wife, at the time of her marriage, concealed the fact that she was then pregnant,<sup>53</sup> or had previously led a life of unchastity.<sup>54</sup>

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#### STATUTORY CAUSES

**15.** The second class of causes for divorce are such as arise after the marriage, and are of purely statutory origin, never having been cognizable in the old English ecclesiastical courts, which, as has been seen, granted divorce only for causes of a canonical nature existing at the time of the marriage. These are, in general, *adultery*, *desertion*, and *cruelty*, but many other causes such as *habitual drunkenness*, *non-support*, *indignities*, and *imprisonment for crime*, are super-added, so that, in the United States, to ascertain what offenses constitute grounds for divorce, the statutes of each state must be consulted.

In England, the only cause for which parliament would grant an absolute divorce was adultery, and the law practically remains in the same condition to this day. An English gentleman never had much difficulty in getting a divorce from his wife on the ground of adultery, upon the due presentation of his proofs; but, in all English history,

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<sup>52</sup> 24 N. J. Eq. 516 (1873).

<sup>53</sup> Stats. Ga., Iowa, Kans.

<sup>54</sup> 22 Md. 337 (1864).

there were but five instances of the British parliament granting a divorce *a vinculo matrimonii* to a wife on the ground of the adultery of the husband, and in two of those instances the adultery was incestuous; in the third, there was abandonment and the grossest injury done the woman which villainy could inflict, and in the fourth and fifth, there was bigamy. It was considered that a wife may and ought to forgive a guilty husband, but that a husband cannot forgive an erring wife. The divorce act of 1858 so far ameliorated the condition of the woman that now, while the only cause for which the husband can secure a divorce *a vinculo matrimonii* remains adultery, the wife may have the marriage dissolved for rape, sodomy, bestiality, or adultery, provided the latter were incestuous, or were coupled with bigamy, or with such cruelty as, without adultery, would have entitled her to a divorce *a mensa et thoro*, or there were also desertion, with the adultery, without reasonable cause, for the period of two years or upwards.

16. Judicial separations may be had by either party for adultery, cruelty, desertion for two years, and sodomitical practices. Desertion has been a cause for divorce or for a judicial separation in England only since the passage of the act of 1858, prior to which time, in the ecclesiastical courts, it was recognized only as a ground for restitution of conjugal rights.<sup>55</sup> Even to this day, in England, where either of the parties has withdrawn from living with the other, without lawful cause, a petition lies for restitution of conjugal rights. Besides these causes for divorce or for judicial separation, authority is vested in certain subordinate police tribunals to give limited relief to a wife who has been deserted and left unprovided for by her husband, by awarding her what is called a *protection order*, which has the effect of protecting her subsequently acquired earnings and property.<sup>56</sup> In addition to this, as has been seen, the act of 1878 confers upon these courts the power to make a separation order, which has all the force and effect of a judicial separation,

<sup>55</sup> Browne & Powles Div., p. 115.

<sup>56</sup> 20 & 21 Vict. (1857), c. 85, Sec. 21.

where the husband has been guilty of an aggravated assault on his wife. The offense of *jactitation of marriage* is also cognizable in England. Jactitation of marriage is where one party falsely boasts or gives out that he or she is married to another, whereby a common reputation of their marriage may ensue. In such cases the English divorce court is vested with power to decree "perpetual silence" against the jactitator, which was the only remedy the ecclesiastical courts could give for this injury. Such actions are not known in the United States.<sup>57</sup> In England, the matrimonial act of 1858 provides that any husband, either in a petition for a dissolution of the marriage or for a judicial separation, or in a separate petition limited to such object, may recover damages from any person proved to have committed adultery with his wife.

17. In Canada, neither the British North America Act of 1867 nor the rules of procedure of the Canadian parliament, which has exclusive jurisdiction in divorce matters, enumerate any causes for divorce, nor define or limit the meaning of the word divorce. In 1887, the parliament granted an application for nullity of marriage, where the marriage had been performed in jest and had not been consummated. In 1888, it granted a *separation de corps* (the equivalent of a divorce *a mensa et thoro*) to a wife on the ground of the cruelty of her husband. With the exception of these two cases, there is no instance of any divorce being either sought or granted in Canada, from the earliest times down to the present day, that was not founded upon the charge of adultery; and there is abundant evidence that the great majority of the people believe that the law of God sanctions divorce from the bonds of matrimony upon that ground alone. Of the twenty-five parliamentary divorces granted in Canada down to the year 1888, thirteen were divorces *a vinculo matrimonii*, granted to husbands for the adultery of their wives, while twelve were absolute divorces granted to wives for the adultery of their husbands.<sup>58</sup>

<sup>57</sup> 1 Lee (Eng.) 165 (1752).

<sup>58</sup> Gemm. Div. in Canada, pp. 49, 50.



18. In the United States, the most common statutory causes for divorce are adultery, desertion, cruelty, non-support, habitual drunkenness, indignities, and imprisonment for crime. In some of the states, no enumeration of the causes for divorce is given, as in Connecticut, where the statute authorizes a divorce for "any such misconduct as permanently destroys the happiness of the petitioner and defeats the purposes of the marriage relation"; in Maine, where a divorce may be had whenever the court thinks it "conducive to domestic harmony and consistent with the peace and morality of society"; or, in Kentucky, where the statute permits divorces *a mensa et thoro* for any cause "within the discretion of the court." In some states, where the statutes specifically enumerate the cause for divorce, public defamation of one married party by the other is a cause for divorce,<sup>59</sup> as is also joining the Shakers, a society which believes sexual intercourse to be unlawful.<sup>60</sup> In other states, absence unheard of for a prescribed number of years is a cause for divorce, as is also voluntary living apart for a statutory time.<sup>61</sup> In some states, the procuring of a divorce in another state is a cause for divorce on the part of the person against whom such divorce was granted.<sup>62</sup> In others, a divorce may be had where a wife can be shown to have been a prostitute before marriage,<sup>63</sup> or to have been pregnant before marriage.<sup>64</sup>

19. **Adultery.**—Adultery is a cause for absolute divorce in every state except South Carolina, where, as has been seen, divorces are unknown, being prohibited by the state constitution. In some states, it is also a cause for limited divorce.

**Adultery** is the voluntary sexual intercourse of a married woman with any man not her husband, or of a married man with any woman not his wife.<sup>65</sup> The third person with whom the offense is committed is variously styled the correspondent, paramour, or *particeps criminis*. A married man

<sup>59</sup> La. Stat.

<sup>60</sup> 97 Mass. 327 (1867).

<sup>61</sup> Stats. Conn., Vt., N. H.

<sup>62</sup> 24 Mich. 180 (1871).

<sup>63</sup> Stats. Va., W. Va.

<sup>64</sup> Stats. Va., W. Va., Ga., Ala., Iowa, etc.

<sup>65</sup> Bish. Mar. & D., Vol. 1, Sec. 703.

who has sexual intercourse with another woman, under the honest but mistaken belief that his own wife is divorced from him, is nevertheless guilty of adultery,<sup>66</sup> though the rule is otherwise where he honestly but mistakenly believed that his wife was dead.<sup>67</sup>

The offense must have been committed voluntarily, and therefore a married woman is not guilty of adultery who has been ravished, or was insane when the intercourse took place.<sup>68</sup> If the allegation be "living in adultery," proof of a single act of adultery is not sufficient. If a single act be charged, the time, place, and party with whom the adultery was committed, if known, should be specified;<sup>69</sup> but general allegations will be sufficient where it can be shown, for example, that there is a venereal disease, or pregnancy, not traceable to the other party.<sup>70</sup>

**20.** The crime of adultery being, in general, committed in secret, direct proof of the commission of the offense cannot in all cases be expected. It has been held sufficient to show that the parties occupied at night the same room in which there was but one bed; or that the wife gave birth to a child without the access of her husband; or that the husband had a venereal disease too long after marriage to have been occasioned before marriage,<sup>71</sup> although there are cases which hold that the bare fact of having a venereal disease is consistent with other theories than that of adultery.<sup>72</sup>

A married woman who knowingly goes to a house of ill-fame unattended, or with a man not her husband; or a married man who visits a bawdyhouse, is presumptively guilty of adultery, unless the circumstances of the visit be satisfactorily explained, so that a reasonable mind would say that the offense was not committed.<sup>73</sup> The character and reputation of the accused is of high importance. The probabilities that the offense was committed may be shown by the

<sup>66</sup> 103 Mass. 572 (1870).

<sup>67</sup> 6 Paige (N. Y.) 207 (1836).

<sup>68</sup> 19 Ala. 522 (1851).

<sup>69</sup> 78 N. C. 102 (1878).

<sup>70</sup> 14 Wend. N. Y. 637 (1835).

<sup>71</sup> *Ibid.*

<sup>72</sup> 32 N. J. Eq. 475 (1880).

<sup>73</sup> 30 Gratt. (Va.) 307 (1878).

fact that the husband had an adulterous mind, and consorted with prostitutes;<sup>74</sup> but it has been held that the antenuptial unchastity of a wife cannot be proved to raise a presumption of postnuptial unchastity, unless the offense sought to be proved were committed with the same person.<sup>75</sup> The fact that the parties were living apart under articles of separation is no defense to a suit for divorce on the ground of adultery,<sup>76</sup> but the insanity of the accused party is generally considered to be a good defense.<sup>77</sup>

**21. Desertion.**—Desertion is the wilful withdrawal of one married party from the habitation and society of the other, or the wilful refusal to renew a suspended cohabitation, without justification in law,<sup>78</sup> persisted in for a period varying from one to five years, according to the statutes of the particular jurisdiction.

In all the states, desertion is named as a cause for divorce. In most states, the innocent party is entitled to the choice of an absolute or a limited divorce. In some states, desertion is a cause for limited divorce only.<sup>79</sup> Except where the statute of the state, as in New Hampshire, expressly requires that in addition to the abandonment there must be a failure to support, the question of desertion is independent of the question of support. The refusal of a husband to support his wife is not of itself desertion,<sup>80</sup> and, on the other hand, a husband who refuses to live with his wife cannot, by supporting her, relieve himself from the charge of desertion.<sup>81</sup> In some states, non-support forms a separate cause for divorce.

To establish desertion, four things must be proved: (1) A premeditated and wilful intention, at the time of leaving, to desert and abandon all matrimonial relations; (2) a cessation from cohabitation for the statutory time; (3) a sustained intention not to resume cohabitation, persisted in for the statutory period; and (4) the absence of the consent of

<sup>74</sup> 21 N. J. Eq. 36 (1870).

<sup>75</sup> 6 N. J. Eq. 628 (1849).

<sup>76</sup> 52 Md. 553 (1879).

<sup>77</sup> 19 Ala. 522 (1851).

<sup>78</sup> Cent. Dict.

<sup>79</sup> Stats. N. Y., N. C.

<sup>80</sup> 22 N. J. Eq. 88 (1871).

<sup>81</sup> 103 Mass. 577 (1870).

the other party to the abandonment, or, in lieu of that, the absence of legal cause for the abandonment.

**22.** There must be a premeditated and wilful intention, at the time of leaving, to desert and abandon all matrimonial relations. In Vermont, the absence of either party for seven years unheard of during that time is a statutory cause for divorce,<sup>82</sup> but, in general, mere absence for any length of time, even such as raises a presumption of death, is not desertion, because not wilful.<sup>83</sup> The mere fact that the parties are living apart does not even raise a presumption of desertion. There must be a causeless and deliberate intention, when leaving, to desert. It follows that if a husband's original departure and continued absence were due to the demands of business, or to sickness, there is no desertion.<sup>84</sup> On the other hand, for like reasons, if a wife leave because her husband forces her to leave, this is not desertion by the wife, but, if it be done without justification, it becomes desertion by the husband, and the rule is the same where the wife drives away her husband.<sup>85</sup>

Ordinarily, wherever the husband has his home, that is the home of the wife.<sup>86</sup> The husband may change his home as often as his business, his health, or his comfort requires, and the wife is required to follow him, and, if she capriciously refuse, she deserts him.<sup>87</sup> Similarly, if the wife undertake to change their home, and he will not follow, she deserts him.<sup>88</sup> On the other hand, the wife is not chargeable in every case with desertion for failing to follow her husband to his new residence. She has some rights which he is bound to respect. He cannot compel her, upon peril of charging her with desertion, to follow him to a foreign country;<sup>89</sup> or to go where her own health and comfort would be seriously jeopardized.<sup>90</sup> It has been even held that he cannot compel her to live with his relations<sup>91</sup>

<sup>82</sup> 29 Vt. 148 (1856).

<sup>83</sup> 113 Mass. 314 (1873).

<sup>84</sup> 13 N. J. Eq. 38 (1860).

<sup>85</sup> 15 Ala. 779 (1849).

<sup>86</sup> 28 N. J. Law 516 (1860).

<sup>87</sup> 14 Cal. 654 (1860).

<sup>88</sup> 17 N. H. 251 (1845).

<sup>89</sup> 30 Pa. 412 (1858).

<sup>90</sup> 4 Wis. 64 (1855).

<sup>91</sup> 29 Vt. 148 (1856).

**23.** There must be a cessation of cohabitation. The parties must cease to live together in a common home.<sup>92</sup> It is not sufficient that the parties merely cease to have sexual intercourse, for the refusal to allow sexual intercourse, however resolute and unjustified, is not a cessation of cohabitation, much less desertion.<sup>93</sup> The cessation of cohabitation must be for the time fixed by the statute. The time begins to run when the intention to desert is formed, and must continue uninterruptedly.<sup>94</sup> If there be a renewal of cohabitation, however temporary, the continuity of the old desertion is broken, and the only actionable desertion is the new desertion, dating from the time of the last abandonment.<sup>95</sup>

If the intention to desert do not exist when the separation takes place, the desertion begins, not from the date of the separation, but from the time when the intention to desert is afterwards formed;<sup>96</sup> and, if the time once begin to run, it does not cease because the party becomes insane or is imprisoned.<sup>97</sup> The intent to desert may be shown by a variety of circumstances tending to sustain, with more or less probability, the desired conclusion; as, where either party leaves the other with the declared intention never to return; or where the husband remains away (being alive) for a longer time than his business errands or affairs can reasonably justify, or forbids his wife from following him, or refuses or neglects to provide for her in his absence, though financially able to do so.<sup>98</sup>

**24.** There must be a sustained intention not to resume cohabitation, persisted in for the statutory period. It has been seen that a renewal of cohabitation destroys the continuity of the desertion. But there can be no renewal of cohabitation so long as the intention to desert continues, for the two things are fundamentally opposed to each other. Renewal of cohabitation, in the meaning of the law, is a penitential return to matrimonial relations. It is the

<sup>92</sup> 14 Cal. 654 (1860).

<sup>93</sup> 97 Mass. 327 (1867).

<sup>94</sup> 14 Cal. 654 (1860).

<sup>95</sup> 5 Iowa 232 (1857).

<sup>96</sup> 23 Ala. 777 (1853).

<sup>97</sup> 31 Iowa 421 (1871).

<sup>98</sup> 58 N. H. 266 (1878).



intention which governs. The occasional return of a wife to the home of her husband whom she has deserted, to look after the children and attend to domestic duties, she all the while intending not to renew cohabitation, does not break the continuity of her desertion,<sup>99</sup> nor, under like circumstances, does sexual intercourse.<sup>100</sup> On the other hand, a wife, who in good faith offers to return to her deserted husband before the statutory period of her desertion has expired, cannot be sued for desertion, irrespective of the question whether the husband consent to receive her back or not;<sup>101</sup> and, in such a case, if the husband refuse to receive her back, a new desertion is introduced, chargeable to the husband, and beginning from the time of such refusal.<sup>102</sup> It will, of course, be understood, that the rule is the same where the wife without cause refuses the offer of her husband to renew a suspended cohabitation.

**25.** There must be the absence of the consent of the other party to the desertion, or, in lieu of that, the absence of any legal cause to justify the desertion. No wife or husband can charge the other with desertion if he or she have assented to the abandonment. A wife who surreptitiously steals away from her husband, deserts her husband; but a wife, who is driven by force from his home, as she has the indubitable consent of her husband to the act, is not guilty of desertion, but he is. A mutual agreement between husband and wife to live apart is not desertion in either.<sup>103</sup>

In the absence of consent to the separation, the legal cause which will justify a desertion must be such, in general, as would have entitled the deserting party to a divorce on his or her part.<sup>104</sup> It is not desertion for a wife to leave a husband who has been guilty of such cruelty to her as prejudices her health or jeopardizes her life, nor is it desertion for a husband to leave a wife who has been guilty of adultery, for cruelty and adultery are almost universally causes for divorce

<sup>99</sup> 34 Ark. 37 (1879).

<sup>100</sup> 87 Ill. 250 (1877).

<sup>101</sup> 23 Miss. 152 (1851).

<sup>102</sup> 37 Pa. 443 (1860).

<sup>103</sup> 49 Pa. 249 (1865).

<sup>104</sup> 37 Pa. 443 (1860).

in themselves. On the other hand, it is desertion for either party to leave the other for any causes not amounting, by statute, to separate grounds for divorce.

**26. Cruelty.**—Cruelty, in the law of divorce, is such conduct by one married party to the other as renders cohabitation unsafe to a degree justifying withdrawal from the marriage relation. It is a cause for divorce in all of the states, except Alabama, though the statutes of each state should be consulted to determine whether such divorce may be both absolute and limited, or limited only; in favor of both husband and wife, or in favor of the wife only. The statutes of some states specifically name particular forms of cruelty as affording causes for divorce, such as attempts by one party to take the life of the other, or endangering the other's reason, or contracting a loathsome disease.<sup>105</sup> Most statutes state this cause for divorce in general language, such as "actual violence to person, attended with danger to life or health, or conduct causing reasonable apprehension of such violence."<sup>106</sup>

The cruelty, to be actionable, must be done knowingly, intentionally, and wilfully. Cruelty committed while insane, or in the delirium of sickness, is not actionable, but cruelty perpetrated while under the influence of intoxication is.<sup>107</sup> It must be leveled at the other party. Cruelty to the children is not cruelty to the wife unless done with the intention to annoy the wife;<sup>108</sup> and so, gaming or gross extravagance is not legal cruelty.<sup>109</sup> The cruelty must, in general, consist of a course of conduct.<sup>110</sup> A single act of cruelty, as a single blow or kick, is not generally considered to be sufficient cause for divorce, for the reason that it is presumed that it will not be repeated.<sup>111</sup> Under different circumstances, however, as where there is reasonable proof that the act is likely to be repeated,<sup>112</sup> or where the offense is aggravated by the wife's pregnancy at the time, a single act of cruelty

<sup>105</sup> Stats. Ill., N. H., Ky.

<sup>106</sup> Ala. Stat.

<sup>107</sup> 60 Ill. 186 (1871).

<sup>108</sup> 1 Barb. Ch. (N. Y.) 516 (1846).

<sup>109</sup> 1 Spinks (Eng.) 196 (1854).

<sup>110</sup> 51 Md. 72 (1878).

<sup>111</sup> 4 Mass. 587 (1808).

<sup>112</sup> *Ibid.*

may be sufficient.<sup>113</sup> A gentle, fragile woman would be granted a divorce when an Amazon would not.<sup>114</sup> One wife was granted a divorce where her husband threw a bucket of water on her, and threatened to do further violence if she did not leave the house.<sup>115</sup>

The cruelty complained of must have been administered without any fault in the other party amounting to a justification. A wife who was knocked against the wall and bruised in a scuffle with her husband for the possession of certain keys which she refused to deliver to him on his request, was denied a divorce.<sup>116</sup> On the other hand, injuries or cruelty inflicted upon a wife in her attempt to resist punishment at the hands of her husband claiming to be in the exercise of his marital rights, afford her just ground for divorce,<sup>117</sup> for the old law that a husband has the right to whip his wife, provided he use a switch no thicker than his thumb, is now exploded, and the rule established that he may use force for prevention, but never for correction.<sup>118</sup>

**27.** Cruelty, within the meaning of divorce law, may consist of the mere infliction of mental suffering unaccompanied by any physical violence or the threats thereof, provided the acts complained of be directed to the other party with the intent to annoy her. In many states, foul, obscene, and disgusting language addressed to a wife, calculated to degrade her and wound her feelings, constitute legal cruelty; and the same is true where the husband is obscene and outrageous to others in her presence, or makes a brothel of his own house,<sup>119</sup> or malevolently accuses the wife of unchastity.<sup>120</sup> In states where such conduct might not be deemed absolute cruelty, the statutes make it a separate cause for divorce for a husband to offer "such indignities to the wife's person as to render her condition intolerable and life burdensome, and thereby force her to withdraw from

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<sup>113</sup> 9 La. 419 (1836).

<sup>114</sup> 31 Iowa 451 (1871).

<sup>115</sup> 11 Ala. 620 (1847).

<sup>116</sup> 4 Eng. Ecc. 429.

<sup>117</sup> 70 N. C. 60 (1874).

<sup>118</sup> 31 Iowa 451 (1871).

<sup>119</sup> 73 Ill. 497 (1874); 21 Mich. 34 (1870); 26 Mich. 417 (1873).

<sup>120</sup> 73 N. Y. 369 (1878).

his home and family.<sup>121</sup> In all cases, however, the acts complained of as producing mental suffering must be shown to have been directed toward the sufferer with the specific intent to annoy her. It follows that a husband's drunkenness, not characterized by any violent behavior toward the wife, is not cruelty, no matter how unhappy it makes the wife.<sup>122</sup>

The cruelty must in all cases be such as to render the cohabitation unsafe or unendurable. Actual bodily injury is, of course, cruelty everywhere, when it endangers life, limb, or health;<sup>123</sup> and so is a reasonable apprehension of injury, for when a husband by threats and menaces reasonably alarms a wife so that she believes her health or life to be in jeopardy, the court will not wait until the hurt is actually done, but will grant her a divorce.<sup>124</sup> It is not necessary in all cases that bodily injury sustained must have been the result of the laying on of hands, or of the use of weapons. A husband's excessive sexual intercourse with his wife,<sup>125</sup> or his intercourse with her when her health is delicate,<sup>126</sup> or his communicating to her a disease, such as the itch, or a venereal complaint,<sup>127</sup> may be cruelty. On the other hand, refusal of sexual intercourse is not cruelty,<sup>128</sup> though it may be an indignity;<sup>129</sup> and, in general, it may be said that any conduct not affecting the health or life, nor of such provocation as to justify a withdrawal from the home on the grounds of physical, mental, or moral safety, is not cruelty. Since persons who marry take each other for better or for worse, mere incompatibility of temper is never legal cruelty,<sup>130</sup> nor is mere want of affection, nor irritating or exasperating conduct, nor the refusal by a husband to permit his wife to go to church, or to visit her family or relatives, nor is desertion, nor is non-support.<sup>131</sup>

**28. Non-Support.**—A husband's neglect or refusal to provide the means of support for his wife is, in a number of

<sup>121</sup> Pa. Stat.

<sup>122</sup> 54 Cal. 262 (1880).

<sup>123</sup> 10 Iowa 133 (1859).

<sup>124</sup> 73 N. Y. 369 (1878).

<sup>125</sup> 58 N. H. 569 (1879).

<sup>126</sup> 27 N. J. Eq. 71 (1876).

<sup>127</sup> 32 N. J. Eq. 475 (1880).

<sup>128</sup> 112 Mass. 298 (1873).

<sup>129</sup> 2 Jon. Eq. (N. C.) 392 (1856).

<sup>130</sup> 31 Iowa 451 (1871).

<sup>131</sup> 32 N. J. Eq. 547 (1880); 3 Paige Ch. (N. Y.) 267 (1832); 54 Cal. 262 (1880).

states, no cause for divorce unless accompanied either by desertion or cruelty. In other states, it forms a distinct and separate ground either for absolute divorce or for a limited divorce, or for both, dependent upon the statutes of the respective states.<sup>132</sup> The failure to support must be wilful, and the husband's ability must be affirmatively shown.<sup>133</sup> A husband who is unable to support his wife by reason of physical or mental incapacity, is not guilty of statutory non-support.<sup>134</sup> The measure of non-support is ordinarily the common necessities of life, or the deprivation of such as would leave the wife a charge upon the charity of others.<sup>135</sup>

**29. Habitual Drunkenness.**—Drunkenness, taken by itself, is not, in many states, a distinctive cause for divorce. In other states, however, when it has become habitual, it entitles the other party either to an absolute or limited divorce, or to a limited divorce only, according to the statutes of the particular state. Some of the statutes require that the habit of drunkenness shall have been formed after marriage,<sup>136</sup> others prescribe that it shall have continued for a definite period, as one, two, or three years.<sup>137</sup> The drunkenness contemplated by these statutes is such as results from the use of alcoholic liquors, and it is not sufficient to show that the party was addicted to the use of opium or chloroform.<sup>138</sup> Drunkenness is habitual when the party gets drunk whenever exposed to temptation, or is usually drunk during business hours, or is drunk for an unreasonable length of time several times a year for a number of years, or cannot be said ever to be sober.<sup>139</sup> The question is always one of law for the court, but it may safely be said that the drunkenness must have developed into such a habit as renders the married condition of the other party intolerable.<sup>140</sup>

<sup>132</sup> Stats. Cal., Ind., Kans., Mass., Mich., Nev.

<sup>133</sup> 58 N. H. 266 (1878).

<sup>134</sup> 82 Ind. 146 (1882).

<sup>135</sup> 9 Cal. 475 (1858).

<sup>136</sup> Stats. Ala., Iowa, Tenn.

<sup>137</sup> 19 Cal. 627 (1862).

<sup>138</sup> 1 Bish. Mar. & D., Sec. 813.

<sup>139</sup> 126 Mass. 205 (1879).

<sup>140</sup> 9 Ark. 507 (1849).



**30. Imprisonment for Crime.**—The statutes of some states make the mere commission of certain crimes, such as sodomy and bestiality, or the fleeing from an arrest for a crime committed, distinct causes for divorce;<sup>141</sup> but, in general, the crime only becomes cognizable in divorce courts when it is followed by actual final imprisonment, by which is meant (in the absence of statutory provision) imprisonment in the state where the parties resided.<sup>142</sup> Imprisonment in another state, in the absence of such a statute, is no cause for divorce.<sup>143</sup>

### DIVORCE SUITS

**31. A divorce suit** is not an action on a contract, nor in tort, nor is it a criminal prosecution. It is an application to the state, through proper channels, for a rescission of that status which was affixed to the parties by law upon the solemnization of their marriage.<sup>144</sup> It is a triangular proceeding, for in every divorce suit the state is an adverse party. The husband and wife represent their respective interests as individuals, while the state is concerned to guard the morals of its citizens by taking care that neither by collusion nor otherwise shall divorces be allowed under circumstances which would reduce marriage to a mere temporary arrangement of conscience or of passion.<sup>145</sup> The proceeding is, therefore, not grounded upon the confessions or admissions of the parties, but only upon full and satisfactory proof of such misconduct as justifies a dissolution of the relation, not according to the individual opinion of the judge, but according to the will of the state, as found in the enactments of its legislature.<sup>146</sup>

In the United States, ordinarily, the state is not represented by an attorney, but only by the court, though, in some of the states, particularly where no appearance has been entered for the defendant, the prosecuting attorney of

<sup>141</sup> Stats. Md., R. I., Ala.

<sup>142</sup> 124 Mass. 394 (1878).

<sup>143</sup> 5 Sneed (Tenn.) 423 (1858).

<sup>144</sup> 44 Ind. 106 (1873); 6 Mo. App. 481 (1879).

<sup>145</sup> 25 Mich. 257 (1872).

<sup>146</sup> 6 Mo. App. 481 (1879).

the county, or a special attorney, is appointed to defend the suit.<sup>147</sup> In Scotland, the lord advocate, and in England, the queen's proctor, represent the interests of the public, and may file pleadings and introduce evidence in the same manner as though they represented an ordinary party.<sup>148</sup>

The decree, in a divorce suit, is partly *in personam*, partly *in rem*.<sup>149</sup> It is *in personam* so far as it concerns the parties as individuals; *in rem* so far as it affects the status of their married relation with respect to the rest of the world.<sup>150</sup>

#### HOW DIVORCE SUITS ARE BROUGHT

**32.** The method of bringing a divorce suit differs in Canada from the procedure either in the United States or in England.

In Canada, where, as has been seen, only parliamentary divorces are granted—except in the provinces of Nova Scotia, New Brunswick, Prince Edward Island, and British Columbia, which still continue to grant judicial divorces under old statutes—the subject of divorce falls under the head of private bill legislation, and the procedure for applying for a divorce is specifically regulated by the rules and order of the Canadian senate. The first step is giving public notice, by publication for a period of six months, of the application for the divorce. The proposed bill is then personally served upon the defendant, or otherwise brought to his attention, and then introduced by a senator in parliament, where it is referred to a committee who, after the testimony has been taken by the production of witnesses, reports it back to the house, together with its recommendations. Upon its passage, the bill is sent to the commons for approval, and then returned to the senate for final action, which is the royal signature.<sup>151</sup>

**33.** In England, all matrimonial causes, whether for dissolution of marriage, judicial separation, nullity, or restitution of conjugal rights, are heard before the court itself,

<sup>147</sup> 120 Ind. 357 (1889).

<sup>148</sup> Nels. Div., Vol. 1, p. 18.

<sup>149</sup> 55 Ala. 437 (1876).

<sup>150</sup> 53 Mo. 575 (1873).

<sup>151</sup> Gemm. Div. in Canada, pp. 63, 145.

unless an order, by summons, have been obtained directing a trial by jury, or damages be claimed, which must of necessity be assessed by a jury. In undefended causes, the only documents or pleadings are a petition with affidavit, citation with affidavit of service, affidavit of search for appearance, application for the registrar's certificate with certificate of marriage, the registrar's certificate, and a praecipe setting down the cause.<sup>152</sup> No cause is called for trial until after the expiration of ten days from the date it was set down. After the hearing, the decree of the court is drawn up.<sup>153</sup>

34. In the United States, where only judicial divorces are, as a rule, granted, suit is commenced by the filing in court of a bill of complaint, or petition, or libel, as it is variously called, setting forth the names of the parties, the date of the marriage, the residence of the parties, the wrong complained of, and the relief sought. In some states, such a libel is neither required to be sworn to nor signed by the petitioner, but only by his solicitor;<sup>154</sup> in others, either or both of these things must be observed.

In a number of the states, where the wife is the petitioner, the suit must be commenced in the name of some friend acting on her behalf, who assumes thereby a responsibility for the costs she may incur in the action, in the event of the husband not paying them;<sup>155</sup> but the tendency of recent legislation is to permit suit to be brought directly by the wife in her own name. In the English ecclesiastical courts, and at the present day in the divorce court, the wife has always sued and defended in her own name.<sup>156</sup>

Personal service of the subpoena, or summons, upon the defendant, notifying him of the institution of the suit, is everywhere required where it is at all practicable. Such service must usually be made by the sheriff of the county where the suit is instituted, or by some duly authorized person acting for him, though, in a great many states, the

<sup>152</sup> Browne & Powles Div., p. 306.

<sup>153</sup> *Ibid.*, pp. 323, 324.

<sup>154</sup> 56 N. H. 219 (1875); 4 Mass. 506 (1808).

<sup>155</sup> 3 Paige (N. Y.) 387 (1832).

<sup>156</sup> 3 Hagg. Con. 263 (1819).

practice prevails of permitting such service to be made by any one. In some states, if there be good reason to apprehend the party is about to flee the jurisdiction, he may be arrested,<sup>157</sup> while in other states the writ of *ne exeat* may be served upon him.<sup>158</sup> The statutes of some states provide that if the defendant be not a resident of the state, service of notice of the suit may be made by publication in certain newspapers for a given length of time, notifying him of the substance of the libel, and warning him to appear in court on a certain day upon peril of having a decree entered in his absence. After notice to the defendant, either by personal service or publication, if he fail to appear, the testimony is allowed to proceed *ex parte*. Upon the question whether the defendant were duly notified of the pendency of the action, and given an opportunity to put in a defense, largely depends the extraterritorial validity of the decree which is finally entered.

**35.** Assuming that service has been made upon the defendant and that the court has jurisdiction of both parties, the defendant may adopt either of several courses. He may file an answer to the libel in which he sets up a good defense, or file a cross-bill in divorce in bar of the libelant's right to a decree, or he may demur to the libel and thus say, in effect, that, conceding the libelant's facts to be true, she is nevertheless not entitled, in law, to the divorce prayed for; or he may simply allow the suit to proceed by default. Under no circumstances, however, will the court permit a divorce to be granted until the facts alleged by the libelant are established by competent evidence; and, in some states, the court has discretionary power to bring in the defendant by attachment and compel him to answer. The answer usually contains a denial by the defendant of the charges contained in the bill, or sets up the defense of collusion, connivance, condonation, recrimination, or delay. It is sometimes filed in the form of a cross-bill in divorce, in which case the latter must be framed with all the

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<sup>157</sup> 21 Hun (N. Y.) 431 (1880).

<sup>158</sup> 2 Md. Ch. 326 (1847).

particularity of an original libel, and be answered to by the complainant. A cross-bill may be prosecuted after the original petition for the divorce has been dismissed by the court.<sup>159</sup>

After the case is at issue, either by the failure of the defendant to appear within the time prescribed or by his duly filing a defense, the testimony in support of the allegations is sometimes taken in open court before a jury (though the statutes of some states do not allow jury trials in divorce),<sup>160</sup> but more frequently before a referee or master, who returns the same to the court, together with his report or recommendation, for final decision.

It was a general rule at common law that in the absence of an enabling statute, neither husband nor wife is a competent witness in divorce suits. The rule obtains today in some of the United States, in the absence of a statute to the contrary.<sup>161</sup> In England, the husband and wife are fully competent as witnesses, though neither is compellable to testify to his or her own adultery;<sup>162</sup> and now, in many of the United States, their incapacity as witnesses has either been wholly or partially removed.

#### ALIMONY

**36.** Alimony is an allowance out of the husband's estate which the court awards to a wife, upon her application either during or after divorce proceedings, for her support while living separate from him. In some cases, where the necessity is urgent, the husband may be allowed alimony out of the income of the wife.<sup>163</sup>

The power of the court to grant alimony exists even when unprovided for by statute,<sup>164</sup> but is now generally regulated by statute both in England<sup>165</sup> and in the majority of the United States, though the nature of the support, the amount, the terms on which it is allowed, and the modes

<sup>159</sup> 44 Ind. 106 (1873).

<sup>160</sup> 51 Iowa 512 (1879); 25 Ark. 487 (1869).

<sup>161</sup> 58 Miss. 15 (1880).

<sup>162</sup> 16 & 17 Vict. (1853), c. 83, Sec. 1.

<sup>163</sup> 42 Iowa 111 (1875); Mass. Stat. (1882); Vt. Rev. Stat. 2,377.

<sup>164</sup> 35 Vt. 365 (1862).

<sup>165</sup> 20 & 21 Vict. (1857), c. 85, Sec. 17.



whereby it may be enforced, differ widely in different jurisdictions. In suits for nullity of the marriage, where the wife is the petitioner, no alimony is, as a rule, allowed;<sup>166</sup> but in ordinary suits for divorce an allowance is sometimes granted the wife, irrespective of the question whether she be the petitioner or the defendant.

Alimony awarded while the suit is pending and undetermined, is called alimony *pendente lite*. It is also called temporary, or *ad interim*, alimony.<sup>167</sup> It is granted in almost every case where the wife is in needy circumstances, except where she is living in open adultery, or where her petition for the divorce discloses no legal ground for the decree asked for.<sup>168</sup>

**37. Permanent alimony** is alimony awarded on or after the determination of the suit. It is the principal feature of a divorce *a mensa et thoro*, but, by statute in some states, it is awarded even in the case of a divorce *a vinculo matrimonii*.<sup>169</sup>

The proportion of the husband's property or income which is awarded to the wife, either by way of alimony *pendente lite* or permanent alimony, is in the discretion of the court,<sup>170</sup> who takes into consideration the husband's means, the situation of the parties in society, the amount of the husband's income, and whether it be derived from property already acquired, or from his own personal and daily exertions; but alimony *pendente lite* is always allowed in a much smaller proportion than permanent alimony.<sup>171</sup> For permanent alimony, where the amount of the estate is considerable, it is usual to allow the wife from one-fourth to one-half. In England, the amount of alimony, whether temporary or permanent, is determined upon what is technically called "an allegation of faculties," which is a statement not only of the husband's extrinsic property, but also of his casual income.<sup>172</sup>

If the wife have sufficient means of her own, no alimony,

<sup>166</sup> 71 N. Y. 269 (1877).

<sup>167</sup> 24 Ark. 522 (1867).

<sup>168</sup> 11 Paige (N. Y.) 166 (1844).

<sup>169</sup> 28 Ohio 596 (1876).

<sup>170</sup> 1 Johns. Ch. (N. Y.) 450 (1815).

<sup>171</sup> 3 Paige (N. Y.) 270 (1832).

<sup>172</sup> 1 Eng. Ecc. 418.

temporary or permanent, will be awarded to her. This is especially true of alimony *pendente lite*, which is always granted irrespective of the merits of the divorce controversy. In such a case, it is immaterial what the nature of the wife's means may be, whether she have her own separate property or be using her husband's property, or be supported by her relations or by her own industry.<sup>173</sup> It has even been held that if she have credit to raise money *pendente lite*, no alimony will be allowed.<sup>174</sup> In the case of permanent alimony, however, the case is altered, and the court will take into consideration the permanent character of her means, and award her support accordingly.<sup>175</sup> The situation of the parties is also taken into account. If the parties belong to the laboring classes, and the wife be accustomed to toil, her husband will not be compelled to maintain her in idleness. If they belong to the higher circles, and the husband be rich or well to do, the fact that the wife has a bare livelihood will not relieve him of the obligation to pay her alimony. The wife must be enabled to live as she has been accustomed to.<sup>176</sup> Usually the amount of alimony is fixed by a due consideration of the joint means of the parties. If the wife's own means exceed the husband's, she is allowed no alimony. If they be less than such proportion, she is allowed the difference.<sup>177</sup>

**38.** There is a conflict of decisions as to whether the remarriage of the wife terminate the alimony, with perhaps the weight of authority in favor of the rule that the alimony will stop if the second husband be amply able to support the wife.<sup>178</sup>

Alimony is not, as a rule, awarded in a gross sum, but in periodical payments,<sup>179</sup> though the statutes of some states authorize the payment of a gross sum.<sup>180</sup> "Suit money," or "costs," is a separate allowance, and so also is counsel fees,

<sup>173</sup> 37 L. J. Mat. Cas. (Eng.) 17 (1864); 22 Mich. 242 (1871).

<sup>174</sup> 26 Ind. 330 (1866).

<sup>175</sup> 22 Ga. 31 (1857).

<sup>176</sup> 22 Ill. 425 (1859); 10 Ga. 477 (1851).

<sup>177</sup> 25 Ind. 156 (1865).

<sup>178</sup> 43 Ohio 499 (1885).

<sup>179</sup> 144 Mass. 278 (1887).

<sup>180</sup> 47 Vt. 667 (1875).

and both are allowed in addition to alimony. As a general rule, alimony is the outcome of a divorce suit, and will only be allowed after a bill or libel has been filed.<sup>181</sup> Nevertheless, in some of the United States and in Canada, separate suits for alimony may be maintained without instituting divorce proceedings.<sup>182</sup>

In the enforcement of a decree for alimony, if a husband, being able to pay, refuse to pay, or by assigning his property intentionally destroy his ability to pay, he is guilty of a contempt of court, and may be imprisoned.<sup>183</sup> It is not usual, however, for courts to imprison a husband who actually and honestly is unable to pay the alimony.

A decree for alimony, within the state where it was made, can only be enforced by the court which made it,<sup>184</sup> but out of such state it may be enforced as a judgment. The process for enforcing it varies in the different jurisdictions. Sometimes it is enforced as an ordinary chancery decree, or by supplementary proceedings, or by execution, or by attachment, or by sequestration of the husband's property, or by charging his land with a lien. Arrears of alimony may be enforced against the estate of a deceased husband,<sup>185</sup> but, in general, upon the husband's death no further alimony is payable, except it be expressly allowed by statute.<sup>186</sup>

#### THE DECREE OF DIVORCE

**39.** The forms of a decree in divorce are various, depending on the character and extent of the relief sought by the petitioner. The decree is either *absolute* or *nisi*. A decree is absolute when it immediately awards the judicial separation of the parties. It is said to be a decree *nisi* when the qualification is attached that the decree is only to become absolute unless the defendant fail to present good cause to the contrary within a specified time prescribed by the court.<sup>187</sup> It is in the nature of a decree of separation,

<sup>181</sup> 24 Ark. 522 (1867).

<sup>182</sup> 69 Ill. 277 (1873); 30 N. J. Eq. 359 (1879); 3 U. C. Ch. 431 (1852).

<sup>183</sup> 123 Mass. 370 (1877).

<sup>184</sup> 100 Mass. 373 (1868).

<sup>185</sup> 40 Wis. 115 (1876).

<sup>186</sup> 64 Me. 484 (1874).

<sup>187</sup> 34 L. J. Mat. Cas. (Eng.) 7 (1861)

and does not dissolve the bonds of matrimony. It is necessary for one of the parties to make an application for an absolute decree,<sup>188</sup> which, when awarded, dates from the time it is rendered, and not from the date of the rendition of the decree *nisi*. Decrees *nisi* are not rendered where the cause for the divorce was desertion, but in all other cases constitute a favorite form of decree in some of the United States, but particularly in England.<sup>189</sup>

The decree may provide for alimony, counsel fees, and costs, for the custody and support of children, for the division of the property of the parties, or the forfeiture of their rights, for the restoration to the wife of her property, or for a variety of other contingencies. In states where there is statutory power to do so, the court, in granting an absolute divorce, may prohibit the guilty party from remarrying during the lifetime of the innocent party.<sup>190</sup> The laws of other states restrict such remarriage to remarriage with the paramour of the guilty party. In general, in the absence of statutory authority, no power exists in the court to restrain either party from marrying again.<sup>191</sup>

**40. Custody of Children.**—There is no fixed rule governing the award of the custody of children in divorce cases. The court, looking mainly to the interest and welfare of the child, exercises a broad discretion and places the child in the custody of that parent with whom it gives promise of being the happiest and best cared for.<sup>192</sup> In general, the party in whose favor the divorce is granted is awarded the custody of the children,<sup>193</sup> especially if the offense be cruelty or adultery.<sup>194</sup> Where both parents are equally unobjectionable, the wishes of the child are respected, and its age and sex are taken into consideration.<sup>195</sup> The tendency seems to be to give younger children, and the girls, to the mother.<sup>196</sup>

<sup>188</sup> 144 Mass. 163 (1887).

<sup>189</sup> 1 P. & D. (Eng.) 691 (1869).

<sup>190</sup> 38 Md. 357 (1873).

<sup>191</sup> 16 Cal. 378 (1860).

<sup>192</sup> 76 Ill. 399 (1875).

<sup>193</sup> 1 Sw. & Tr. (Eng.) 489 (1859).

<sup>194</sup> 39 Miss. 423 (1860).

<sup>195</sup> 68 Ill. 17 (1873).

<sup>196</sup> 81 N. J. Eq. 543 (1879); see *The Law of Parent and Child*.

**41. Wife Resuming Her Maiden Name.**—A woman who obtains a decree of divorce may, even without the formality of a decree, resume her maiden name, or, in a number of states, the name of any former husband. The rule appears to be the same whether she be the plaintiff or the defendant in the action.<sup>197</sup> It has even been said that a wife is not bound during her marriage to use her husband's surname, though custom and the proprieties of society require her to do so. In Spain, the wife retains her family designation after marriage, and the children may choose whether to adopt the parental or maternal surname.<sup>198</sup> In England, a divorced woman, whether she have been petitioner or respondent, keeps her name acquired by marriage until she acquires another by repute.<sup>199</sup>

**42. Conclusiveness of a Decree.**—A final decree in divorce is, in most jurisdictions, subject to the right of appeal to a higher tribunal. Nevertheless the statutes of the various states in the United States are by no means uniform as to the powers and duties of such appellate courts. In some states, the courts of appeal have no power to review or reverse a final judgment for divorce on its merits, the appeal lying only from an order dismissing the petition in divorce, or from a final order or judgment granting alimony. Where an appeal is allowed, but none is taken, the decree is conclusive upon the parties, and, to a certain extent, conclusive also as to the rest of the world, unless it can be shown to be either a void or voidable decree, in which case it may be opened and vacated.

A decree is void which has been passed by a court that had no jurisdiction of the case,<sup>200</sup> but a decree passed by a court which had jurisdiction, but exercised its jurisdiction irregularly, or was imposed upon, is voidable.<sup>201</sup> Application to have a decree set aside because it was void or voidable can be made only by the parties to the suit, and not by third persons.<sup>202</sup> Great caution is observed by the courts in

<sup>197</sup> Browne Div., p. 399.

<sup>198</sup> Lloyd Div., p. 246.

<sup>199</sup> 2 P. D. (Eng.) 263 (1877).

<sup>200</sup> 84 Ind. 380 (1882).

<sup>201</sup> 38 Pa. 241 (1861).

<sup>202</sup> 28 Barb. (N. Y.) 299 (1858).



vacating a decree of divorce, particularly where the rights of third parties have intervened, or one of the original parties has remarried. The burden of proof to establish the illegality of the decree is on the party making the application, and the proof must be clear and satisfactory.

The decree may be vacated on the application of the injured party, even though the other party have remarried or be dead;<sup>203</sup> but the remarriage of the party making the application is a bar to the vacation of the decree.<sup>204</sup> The effect of the vacating of a decree of divorce is to revive the marital relation of the parties as if there never had been divorce proceedings.<sup>205</sup> The intervening remarriage of one of the parties is *ipso facto* void, and the children resulting from it are illegitimate.<sup>206</sup>

#### EFFECT OF DIVORCE .

43. An absolute divorce *a vinculo matrimonii*, or from the bonds of marriage, is an absolute dissolution of all marriage ties and the destruction of the relation of husband and wife. After the date of the decree, the man has no wife and the woman no husband. Such a divorce dissolves the marriage as absolutely as death does. The parties are thenceforward strangers to each other, and may contract with each other and sue each other as third persons may.<sup>207</sup> In England, both parties may marry again; and this is so in the United States except where, by statute, such remarriage is forbidden, in which case, if one of the parties remarry in defiance of the prohibition, the crime is not bigamy, but a misdemeanor only.<sup>208</sup> After an absolute divorce, the wife is an intruder in her husband's house, and he may lock her out.<sup>209</sup> She cannot pledge her husband's credit, or sue him for alimony.<sup>210</sup> Unlike, however, a sentence of nullity of the marriage, an absolute divorce does not restore the parties, in every particular, to the position they were in before the

<sup>203</sup> 38 Pa. 241 (1861).

<sup>204</sup> 51 Ind. 542 (1875).

<sup>205</sup> 23 Kans. 513 (1880).

<sup>206</sup> 12 Pa. 328 (1849).

<sup>207</sup> 28 Ala. 332 (1855).

<sup>208</sup> 43 Me. 258 (1857).

<sup>209</sup> 83 Ill. 291 (1876).

<sup>210</sup> 36 Iowa 319 (1873).

solemnization of the marriage, but takes effect only from the date of the decree. The marriage having existed, been affirmed, and dissolved, the respective property rights of the parties demand readjustment.

The general rule is that all property rights of the parties, except such as have become vested in them, terminate upon the dissolution of the marriage.<sup>211</sup> Thus, a marriage settlement, whether made before or after the marriage, or in the nature of a deed of separation,<sup>212</sup> remains unaffected by an absolute divorce, in the absence of a contrary agreement by the parties or the provisions of some statute. Where the parties, by virtue of the marriage, held a piece of property as tenants by entireties, they hold the property, after the divorce, as joint tenants, in England,<sup>213</sup> and as tenants in common, in some of the United States. In other states, a tenancy by the entirety is unaffected by divorce. The wife's own realty is restored to her absolutely, freed of any rights of her husband by way of curtesy or otherwise, and the law is the same with respect to her separate personal property,<sup>214</sup> except in states where it is provided by statute that an equitable division of the realty and personalty of the parties shall be made. In the absence of contrary statutory provision, an absolute divorce destroys the wife's dower in her husband's lands,<sup>215</sup> but does not affect transfers of property made by the parties during the marriage.<sup>216</sup> The wife has no further rights in her husband's personal property, except such as are expressly given to her by statute or by the decree, and upon his death she takes nothing.<sup>217</sup>

44. The effect of a divorce *a mensa et thoro*, on the other hand, is not to put an end to the marriage tie or to destroy the relation of husband and wife, but simply to suspend certain of the mutual rights and obligations of the parties, indefinitely or for a limited time, or until they become

<sup>211</sup> L. R. 1 Q. B. Div. (Eng.) 426 (1876).

<sup>212</sup> 26 Ind. 400 (1866); 8 Phila. 113 (1870).

<sup>213</sup> See *The Law of Husband and Wife: Tenancy by the Entirety*.

<sup>214</sup> 28 Ala. 332 (1856); 10 Conn. 225 (1834); 38 Miss. 64 (1859).

<sup>215</sup> 36 Md. 511 (1872).

<sup>216</sup> 8 Conn. 541 (1831).

<sup>217</sup> 6 Ind. 229 (1855).

reconciled and live together again. In coming together, no new marriage is required; neither, under the general law, are any new proceedings in court necessary; but the reconciliation, of its own force, annuls the sentence of separation. Neither of the parties can remarry upon pain of bigamy. Separation is both authorized and enjoined, and, if the wife give birth to a child conceived after the decree, there arises no presumption of the husband's paternity of the child.<sup>218</sup> In the United States, the property rights of the parties are in no way affected by the divorce, except as expressly stated in the decree. The wife cannot convey her realty without the consent of the husband, and each preserves the right of dower or curtesy.<sup>219</sup> The most usual feature of a divorce *a mensa et thoro* is the provision made for alimony for the wife, in which event she has no other present claim upon her husband's estate, save the right to apply for an increase of this allowance. Upon the death of the husband, if no reconciliation have taken place, she takes her share of his estate as widow. When the woman dies, her husband is her widower, and has all a widower's rights in her estate.<sup>220</sup>

In England, after a judicial separation, the wife, from the date of the sentence, and while the separation continues, is considered *feme sole*, both as to the acquisition of property and as to the disposition of it while alive, or when dead, by her will. She has full power to contract, sue, and be sued, and her husband is not liable for her torts or contracts, unless he fail to pay alimony, in which case she can pledge his credit. Upon a reconciliation, she is entitled, for her separate use, to all property which she possessed at the time cohabitation was renewed.<sup>221</sup> The effect of a protection order is that the wife's earnings and property acquired since the desertion belong to her as a *feme sole* for her separate use, free from her husband's marital rights; and she can sue and be sued as if she had obtained a decree of judicial separation.<sup>222</sup>

<sup>218</sup> 1 Barb. Ch. (N. Y.) 375 (1846).

<sup>219</sup> 6 W. & S. (Pa.) 85 (1843).

<sup>220</sup> 36 Md. 511 (1872).

<sup>221</sup> 20 & 21 Vict. (1857), c. 85, Sec. 7.

<sup>222</sup> *Ibid.*, Sec. 21.

## EXTRATERRITORIAL EFFECT OF DIVORCE

45. It is a rule of international law that every independent nation, and, in the United States, every state, has the right to enact laws and regulations prescribing the conditions upon which its courts may grant divorces. International law has for its primary object the government of all nations as one great family, by the due exhibition of such courtesy to the laws of each nation as the sovereignty, independence, and public policy of each nation may safely permit or justify. Were it not for the comity of nations, and the established principles of international law, it would be possible for one man to be legally married to different women in all parts of the globe and in every state.

A divorce granted without fraud and in strict compliance with the statutory requirements of any state, is unquestionably valid in that state,<sup>223</sup> but its extraterritorial effect, that is, its validity in other states or in other countries, depends upon the question whether the court granting the divorce had obtained jurisdiction both over the subject-matter of the suit and over both parties to the suit.<sup>224</sup> This results from the consideration that the position of the parties as husband and wife in the community in which he or she is domiciled depends on the marriage laws of such community, and is called the status of each party,<sup>225</sup> and that every decree in divorce is partly *in personam* and partly *in rem*.<sup>226</sup> So far as a divorce is to change the status of the married party, it is a thing independent of the parties, being a proceeding, not against the parties but against their status, and the decree is *in rem*.<sup>227</sup> So far as the divorce relates to alimony, or to costs, or to a prohibition against remarriage, it is a proceeding leveled, not at the status of the parties but at the parties themselves, and the decree, to that extent, is *in personam*.<sup>228</sup> Where the husband and wife have different domicils, as is frequently the case, there is a distinct status as to each,

<sup>223</sup> L. R. 4 P. Div. (Eng.) 1 (1878); 95 U. S. 714 (1877).

<sup>224</sup> 56 Md. 127 (1880).

<sup>225</sup> 53 Mo. 575 (1873).

<sup>226</sup> 44 Ala. 437 (1870).

<sup>227</sup> 53 Mo. 575 (1873).

<sup>228</sup> 56 Md. 127 (1863).

respectively controlled by two different states or countries.<sup>229</sup> The domicil of the parties is, therefore, the controlling test for determining the validity of any divorce, both with respect to the state granting the divorce and with respect to other states or countries.

46. With respect to the state or country granting the divorce, it is apparent that the domicil of the libelant is the essential requisite to the validity of the divorce in that state. Every state has the constitutional right to control the domestic status of those who make their home in it, and the first duty of every person who applies for a divorce at its hands is to establish the fact that he has his domicil in the state. Domicil is the place where a person has fixed his habitation without any formed intention of removing therefrom.<sup>230</sup> A man can have but one domicil at any one time. Though the words residence and domicil are not synonymous, yet in divorce statutes the word residence usually implies domicil.<sup>231</sup>

The statutes of the various states regulate the length of time during which the applicant must have maintained a domicil in the state before beginning his action, as also the particular county within which the suit must be brought. Such residence or domicil must be actual and *bona fide*,<sup>232</sup> not taken for the purpose of divorce, and must be permanent, not a mere visit.<sup>233</sup> It must exist when the suit is brought, and must continue the specified time.<sup>234</sup>

Generally, the place where the offense was committed is immaterial in divorce jurisdiction, except that, in certain of the United States, the statutory term of residence is not required of the libelant where the offense was committed within the state.<sup>235</sup> In other states, if the act took place outside the state, the parties must have lived in the state as man and wife at some period prior to the commission of the act. In all the states, where the marriage was celebrated in the state, the place of the commission of the offense is immaterial.<sup>236</sup>

<sup>229</sup> 76 N. Y. 85 (1879).

<sup>230</sup> 112 Cal. 101 (1896).

<sup>231</sup> Browne Div., p. 328.

<sup>232</sup> 33 Ala. 486 (1859).

<sup>233</sup> 39 Wis. 651 (1876).

<sup>234</sup> 29 N. J. Eq. 410 (1878).

<sup>235</sup> 63 Hun (N. Y.) 516 (1892).

<sup>236</sup> Browne Div., p. 328.



47. A divorce duly granted without fraud to a person duly domiciled in the state or country granting the divorce is, so far as respects the libellant, a valid divorce, not only in that state but in every other state or country, notwithstanding the defendant was domiciled out of the state, provided all the statutory requirements for giving the defendant notice of the proceedings were observed.<sup>237</sup> In such a case, it is immaterial (except under unusual statutes prevailing in the foreign jurisdictions) that the parties were married, or the offense committed, in some other state than the state which granted the divorce.<sup>238</sup> And, if the defendant, though domiciled out of the state, were nevertheless duly served with process in the state granting the divorce, or voluntarily appeared in the suit, the divorce is valid everywhere as to both parties. In such a case, the state granting the divorce would acquire not only jurisdiction of the subject-matter but also jurisdiction of both parties, and the divorce would be valid, not only by the comity of nations and international law in all parts of the world, but also in the United States by that clause of the federal constitution which requires that "full faith and credit shall be given in each state to the judicial proceedings of every other state."<sup>239</sup>

If, however, the defendant were not domiciled in the state granting the divorce, and were not personally served with process in the state, or did not voluntarily appear, the divorce is, so far as respects the defendant, absolutely inoperative anywhere in the world, for no one state, in granting a divorce to one of its citizens, can push its domestic policy beyond the confines of its own boundary, and arbitrarily change the domestic status of citizens of another state or country. Such a defendant, as to his part of the marriage, remains undivorced, and not only is such prior divorce no bar to an application on his part in his domicil for a divorce,<sup>240</sup> but if he marry again on the strength of the prior divorce, the

<sup>237</sup> 3 Wis. 662 (1854).

<sup>238</sup> L. R. 5 P. Div. (Eng.) 153 (1880); 28 Ala. 12 (1856); L. R. 2 P. & D. (Eng.) 435 (1872); 10 Mass. 260 (1813).

<sup>239</sup> 56 Md. 127 (1880); 45 N. Y. 535 (1871); U. S. Const., Art. IV, Sec. 1.

<sup>240</sup> 76 N. Y. 78 (1879).

courts of his domicil may deem him a bigamist,<sup>241</sup> unless his state have in some way, as by analogous legislation, concurred in the prior divorce.<sup>242</sup>

48. Where both parties are domiciled in the state, and the defendant has been personally served with process or entered an appearance, the case is free from difficulty; for, the courts of that state having jurisdiction both of the subject-matter and the parties, the divorce can only be legally granted in that state, and is valid in every state and country, both so far as the decree is *in rem* and so far as it is *in personam*;<sup>243</sup> but, if the defendant, though domiciled within the state, have not been personally served or entered an appearance, the divorce, while valid in every other state so far as the decree *in rem* is concerned, has no extraterritorial effect as to the portion of the decree which is *in personam*.<sup>244</sup>

Where neither of the parties is domiciled in the state granting the divorce, such state, having no control over the status of the parties, has no right to dissolve the relation, and other states are not bound to recognize the validity of the divorce, even though both parties submitted themselves to the jurisdiction of the court granting the divorce.<sup>245</sup> The comity of nations will not allow one country to change the marriage status of citizens of another country, nor does it call upon one state to tolerate another state's interference with the domestic relations of its citizens.<sup>246</sup> Jurisdiction in divorce belongs to the courts of the state of the domicil of the parties.

It should be said that, in the United States, for the purposes of divorce, the wife may have a separate domicil from that of her husband. Ordinarily, as has been seen, the husband has the right to fix the matrimonial home, but this is true only of a husband who has been guilty of no matrimonial offense. A wronged wife, who is herself without fault, may sue her husband in divorce wherever she is in

<sup>241</sup> 25 Mich. 247 (1872).

<sup>242</sup> 24 Wis. 372 (1869).

<sup>243</sup> 39 N. H. 20 (1859); 95 U. S. 714 (1877).

<sup>244</sup> 44 Ala. 437 (1870).

<sup>245</sup> 25 Ga. 473 (1853); 20 Ala. 629 (1852).

<sup>246</sup> L. R. 6 P. D. (Eng.) 35 (1880).

fact domiciled;<sup>247</sup> but whether, on the other hand, she can sue him in his domicile, upon the fiction that his domicile is hers, is not so well settled.<sup>248</sup> It appears that if the husband sue in his domicile, the wife, though a non-resident, may file a cross-bill as answer.<sup>249</sup> The doctrine of the wife's separate domicile has not yet been accepted in England.<sup>250</sup>

The jurisdiction of the English divorce court is coextensive only with the term England itself, which includes England, Wales, and the town of Berwick-on-Tweed. For the purpose of divorce jurisdiction, Ireland and Scotland are "foreign" countries, just as in the United States every state is "foreign" to the other states.<sup>251</sup>

It appears to be clearly settled that under no circumstances will the Canadian parliament recognize a divorce granted in the United States as valid and conclusive in Canada.<sup>252</sup>

## DEFENSES TO DIVORCE SUITS

**49.** As in all other suits, the leading defense to an application for divorce is a total denial of the offense charged. Insanity, also, is generally a defense.<sup>253</sup> There are, besides, five special defenses, which not only existed under the old ecclesiastical law but are recognized today in the divorce jurisprudence of England, Canada, and the United States, by statute. Either one of these defenses, if satisfactorily established by evidence, will defeat an action for divorce. They are *collusion*, *connivance*, *condonation*, *recrimination*, and *delay*, or the *Statute of Limitations*.

**50. Collusion.**—A concerted private agreement of the parties to concoct a case for the purpose of procuring a divorce from each other, is called **collusion**.<sup>254</sup> It is an imposition on the court, which will be vigilant to take notice of its presence in any case, for divorces are granted not to

<sup>247</sup> 29 Ala. 719 (1857).

<sup>248</sup> 20 Ala. 629 (1852).

<sup>249</sup> 2 Ill. App. 223 (1878).

<sup>250</sup> L. R. 2 P. & D. (Eng.) 156 (1872).

<sup>251</sup> 1 Sw. & Tr. (Eng.) 586 (1859).

<sup>252</sup> Gemm. Div. in Canada, p. 27.

<sup>253</sup> 19 Ala. 522 (1851).

<sup>254</sup> 36 Conn. 177 (1869).

suit the desires of individuals but to conserve the interests of society and the public morals. It involves the concerted action of both parties to the suit, and may be either active or passive. It is active, when the one party agrees with the other that he will commit, or suffer to be committed, the act to be complained of in order to afford a cause for divorce. It is passive, when the understanding is that facts shall be suppressed which otherwise might constitute a good defense.<sup>255</sup>

**51. Connivance.**—Connivance is the complainant's previous consent to the acts now complained of, and, as a defense, is based upon the maxim that one who consents to the commission of a wrong has put himself outside the pale of legal redress.<sup>256</sup> It differs from collusion, in that it does not involve the concerted action of both parties but is confined to the complainant, who alone can be chargeable with it. It consists either in having used guilty means to bring about the act, or in the failure to take proper precautions to prevent it.<sup>257</sup> As a defense, it is usually applied to suits for adultery, but, on principle, is applicable to desertion, cruelty, or any other cause for divorce.

Active connivance, or the taking of steps to induce the act complained of, is where, for example, a husband purposely introduces a notorious debauché to his wife, or gets a friend or other person to entrap her into adultery.<sup>258</sup> Passive connivance is where, without actually participating in the act, the party has corrupt and guilty knowledge of the wrongdoing, but takes no steps to prevent or oppose it. There must be the wilful intent to close the eyes and not see the wrong which is being perpetrated. Mere dulness of perception and the like, which exclude intention, are not connivance. The connivance of either party to the other's adultery is a bar to subsequent complaints of subsequent acts of adultery either with the same or a different person.<sup>259</sup>

<sup>255</sup> 47 L. J. Mat. Cas. (Eng.) 22 (1877).

<sup>256</sup> 21 N. J. Eq. 61 (1870).

<sup>257</sup> 1 Rob. Ecc. (Eng.) 144 (1844).

<sup>258</sup> 41 Barb. (N. Y.) 114 (1863).

<sup>259</sup> 21 N. J. Eq. 61 (1870).

**52. Condonation.**—Forgiveness of an offense, conditional upon its not being repeated, is **condonation**. It is available as a perfect defense to a divorce suit where the party accused of the offense can show both that the offense was forgiven and that the condition was performed.<sup>260</sup> It is usually applied to suits for adultery, and, in some jurisdictions, to suits for cruelty.<sup>261</sup> Condonation involves an act on the part of both the complainant and the defendant, and the act of each must be satisfactorily proved by him who invokes the defense. It must be shown that the complainant forgave the offense, and it must be shown that the defendant performed the condition on which the forgiveness depended.

The forgiveness of the offense may be shown by the express words or writing of the complainant to that effect, or by such conduct on his or her part as conclusively establishes that the offense was blotted out.<sup>262</sup> A husband who knows of his wife's adultery, but receives her back to his conjugal embraces, is conclusively held to have condoned the offense, though he does not in express words forgive her;<sup>263</sup> but one night's intercourse during desertion, where the intent is to continue in the desertion, has been held not to be condonation.<sup>264</sup> It is essential that the forgiveness was freely given, and not obtained by force or fraud; and this is particularly true of the wife, whose forgiveness is less readily presumed than the husband's, since what with him might mean forgiveness may, with her, show only patient endurance.<sup>265</sup>

The forgiveness is always conditional. If the condition exacted be not express, yet the law will imply a promise that there shall be no just cause for complaint in the future. This implied promise involves, not only that the same offense shall not be repeated but that the delinquent will treat the other party with all conjugal kindness.<sup>266</sup> If the

<sup>260</sup> 34 Ind. 368 (1870).

<sup>261</sup> 2 Gray (Mass.) 434 (1854).

<sup>262</sup> 44 Ala. 437 (1870); 1 Hagg. Ecc. (Eng.)

789 (1799).

<sup>263</sup> 7 Phila. 405 (1873).

<sup>264</sup> 87 Ill. 250 (1877).

<sup>265</sup> 23 Ala. 785 (1853); 73 Ill. 497 (1874).

<sup>266</sup> 34 Ind. 368 (1870).



delinquent keep his promise, the forgiveness becomes condonation, and is a bar to a suit for divorce.<sup>267</sup>

**53. Recrimination.**—Recrimination is a showing by the defendant of a cause of divorce against the plaintiff in bar of the plaintiff's cause of divorce. When one cause for divorce is thus set off against another cause for divorce, neither party can obtain a divorce, for divorce is a remedy provided for an innocent party, and a divorce granted to both parties would be an anomaly.<sup>268</sup> In such a case, the parties being equally guilty against the married state must be left to themselves; for, as one court put it, "they are two miserable wretches, to be dismissed summarily from the consideration of the court."<sup>269</sup>

In the United States, as well as in England, any cause for divorce is in general a good defense by way of recrimination against any other.<sup>270</sup> Thus, adultery is a good defense against adultery, desertion, cruelty, habitual drunkenness, or any other statutory marital offense, and vice versa.<sup>271</sup> Recrimination is not, however, a defense to a cause for nullity of marriage, unless expressly made a defense by statute.<sup>272</sup>

**54. Delay, or the Statute of Limitations.**—In the United States, the statutes of many of the states prescribe the time within which a suit for divorce must be commenced. This time is variously fixed from one to five years from the commission of the offense, after the expiration of which time no suit can be maintained. The English divorce law provides that where the action is not commenced within two years, the petition shall be dismissed unless some sufficient reason be given for the delay. This provision leaves the matter within the discretion of the court, and does not operate as an absolute bar, as in the case of the statutes in the United States. In those states which have enacted no statute of

<sup>267</sup> 34 Ind. 368 (1870).

<sup>268</sup> 23 Ala. 777 (1853).

<sup>269</sup> 72 N. C. 530 (1875).

<sup>270</sup> 12 Mo. 53 (1848); 10 H. L. Cas. (Eng.) 685 (1864).

<sup>271</sup> Bish. Mar. & D., Vol. 2, Sec. 87.

<sup>272</sup> *Ibid.* Sec. 77.

limitation on the subject, the court is free to apply the principles of equity, and permit the plaintiff to explain the delay in bringing his suit; for lapse of time, independently of statute, is no bar, but only raises a presumption of condonation which it is the duty of the complainant satisfactorily to explain or rebut. The question of what constitutes an unreasonable delay is one of law for the court under all of the circumstances of the case.<sup>273</sup> In one case, an unexplained delay for two years was held to be a bar,<sup>274</sup> while in another case nineteen years' delay was satisfactorily explained.<sup>275</sup> Want of funds to prosecute, or lack of proof, or hopes of reconciliation, and the like, are illustrations of reasons for delay in instituting the suit which have been favorably regarded by the courts.

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<sup>273</sup> 97 Mass. 331 (1867).

<sup>275</sup> 3 Sw. & Tr. (Eng.) 362 (1864).

<sup>274</sup> L. R. 3 P. & D. (Eng.) 53 (1873).



# THE LAW OF PARENT AND CHILD

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## INTRODUCTION

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### THE RELATION AND DEFINITIONS

**1. What the Relation Creates.**—The relation of parent and child creates certain reciprocal duties and responsibilities, which are based upon the natural affections, and the law in regard to these follows the trend of those affections very closely. The relation is *prima facie* established if the parents be recognized as husband and wife.<sup>1</sup>

**2. Persons in Place of Parents.**—A quasi parental relation (that is, one that is similar to the relation of parent and child in some respects, but not in all) exists between children and certain persons who, though not their parents, stand for the time being in the place of a parent to them, or, as it is technically called, *in loco parentis*. The proper definition of a person *in loco parentis* to a child is one who means to put himself in the situation of the lawful parent of the child, with reference to the father's office and duty of making provision for the child; a person assuming the parental character and discharging parental duties.<sup>2</sup> A stepfather who assumes the charge and control of his wife's children by her first husband, an adoptive parent, and a schoolmaster, are examples of persons who stand *in loco parentis* in varying degrees.

**3. Parent and Child.**—A parent is the immediate ancestor, that is, the father or mother; the word includes

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<sup>1</sup> 20 N. H. 505 (1846); 75 Ill. 315 (1874).

<sup>2</sup> 24 N. J. Law 680 (1855).

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both sexes. The commonly accepted definition of the word *child*, with reference to descent, is, a son or daughter; a male or female descendant in the first degree.<sup>3</sup>

4. **Children.**—The word *children*, in its primary and precise sense, stands for immediate offspring of both sexes.<sup>4</sup> In statutes of descent and distribution the words *child* and *children* do not include grandchildren or other descendants more remote than the first degree of the person named as ancestor.<sup>5</sup> But the words may be interpreted as including grandchildren, representatives of a deceased child, where it can fairly be seen from the context that such was the intention of the testator as exhibited in his will.<sup>6</sup> In many cases the rule is laid down by the courts that grandchildren can be included under the term *children* only (1) when the instrument in which it is used would be inoperative, unless the term were held to include grandchildren, there being no persons in existence to answer to the definition of it in a limited sense, and (2) when the maker of the instrument has clearly shown by other words that he did not intend to use the term in its proper sense.<sup>7</sup>

In the term *children*, illegitimates are included, where it is used in designating children generally.<sup>8</sup> Strictly, the term means legitimate offspring. The particular words used are often significant; as, where a testator devises property to a daughter and, at her death, to "all the children of her body," the word *children* will include the illegitimate children, if there be such.<sup>9</sup> Adopted children will come within the term *children* when there are no others that answer the description;<sup>10</sup> but in some cases the contrary is held,<sup>11</sup> depending, in most instances, upon the purpose for which the term is used.<sup>12</sup>

<sup>3</sup> 104 Mich. 11 (1895).

<sup>4</sup> 57 Hun (N. Y.) 396 (1890).

<sup>5</sup> 39 Cal. 529 (1870).

<sup>6</sup> 104 Mich. 11 (1895); 10 Ves. (Eng.) 196 (1804); 148 Mass. 203 (1889).

<sup>7</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 5, p. 1,088, citing 10 Ves. (Eng.) 196 (1804), 3 Pick. (Mass.) 363 (1825), 133 Pa. 260 (1890), and other cases.

<sup>8</sup> 30 Ch. Div. (Eng.) 112 (1885); 1 Ves. & B. (Eng.) 422 (1812).

<sup>9</sup> 113 N. C. 301 (1893).

<sup>10</sup> 73 Me. 27 (1881); 115 Mass. 262 (1874).

<sup>11</sup> 54 Pa. 304 (1867).

<sup>12</sup> 110 N. Y. 216 (1888).



Used with reference to relationship merely, the terms child and children include adults, but when used with reference to age, they are confined to minors. The usual acceptance of the term child in this connection is, a young person of either sex; hence, one who exhibits the character of a very young person. Consequently, the term generally means a young person as contradistinguished from one of age sufficient to be supposed to have settled habits and fixed discretion.<sup>13</sup>

**5. Infants.**—An **infant** is a person under the age of twenty-one years.<sup>14</sup> In its legal signification the term embraces any person who has not yet arrived at the age prescribed by law as full age. At common law, no person acquires fully all his political and civil rights until he is twenty-one years of age, at which time his infancy terminates, the period of emancipation being the same in both sexes. In the United States, the common-law rule prevails, except in jurisdictions where it has been altered by statute; in a number of states females reach their majority at the age of eighteen years.<sup>15</sup>

The exact time when an infant is reputed to be twenty-one years old, or of full age, is the first instant of the last day of the twenty-first year next before the anniversary of his birth, because, according to the civil computation of time, which differs from the natural computation, the last day having commenced, it is considered as ended.<sup>16</sup> If, for example, a person were born on January 1, 1902, even a few minutes before 12 o'clock of the night of that day, he would be of full age at the first instant of the thirty-first day of December, 1922, although nearly forty-eight hours before he had actually attained the full age of twenty-one years, according to years, days, hours, and minutes, because there is, in this case, no fraction of a day.<sup>17</sup> Accordingly, a man is entitled to vote on the day preceding the twenty-first

<sup>13</sup> 18 Tex. App. 53 (1885).

<sup>14</sup> Co. Litt. 171.

<sup>15</sup> 2 Kent's Comm. 233; 49 Ill. 53 (1868).

<sup>16</sup> Bouv. Law Dict., citing Savigny, Dr. Rom., Sec. 186; 6 Ind. 447 (1855).

<sup>17</sup> 1 Sid. (Eng.) 162 (1683); 1 Black. Comm. 463.

anniversary of his birth.<sup>18</sup> The age at which infants may marry is a different question and is treated under the appropriate title.<sup>19</sup>

In England and the United States, for the purpose of property, infants are deemed *in being* from the time of conception. Thus, a child unborn is held to be included in a bequest or devise to children or grandchildren, or to persons "living at the death" of the testator.<sup>20</sup> For certain purposes, especially for all beneficial purposes, an unborn child is to be considered as born. Its civil rights are equally respected at every period of gestation. Besides being capable of taking under a will, and by descent, it may be appointed executor, may have a guardian assigned to it,<sup>21</sup> and may have an injunction obtained for it to stay waste.<sup>22</sup>

## DUTIES AND RIGHTS

6. The reciprocal duties created by the relation of parent and child exist generally only where the child is still an infant, that is, has not arrived at the age when it is legally freed from the parent's control. But, even before the child has reached that age, it may be freed from its obligation to a certain extent by the voluntary act of the parent; and even after majority, the child may remain with its parents under the same relation as before. The law will not presume any change in that relation from the mere fact that the child is twenty-one, and whether emancipation have taken place or not depends entirely upon the intention of the parties, as shown by their actions.<sup>23</sup>

<sup>18</sup> 3 Harr. (Del.) 557 (1840).

<sup>19</sup> See *The Law of Husband and Wife: Competency of Parties*.

<sup>20</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, p. 259, citing 2 H. Bla. (Eng.) 399 (1795); 3 Ch. Div. (Eng.) 773 (1876); 15 Pick. (Mass.) 255 (1834).

<sup>21</sup> See *The Law of Executors and Administrators*, and *The Law of Guardian and Ward*.

<sup>22</sup> Bouv. Law Dict., citing 3 Johns. Cas. (N. Y.) 18 (1817), 5 S. & R. (Pa.) 38 (1819), Bing. Inf., c. 7, and other authorities.

<sup>23</sup> 16 Pa. 489 (1851).

## DUTIES OF PARENTS

7. The principal duties that the parent owes the child are those of *protection, maintenance, and education.*

8. **Protection.**—It is the duty of the parent to protect his children, and this duty has been so closely followed that very little or no judicial discussion has been required in modern times on this subject. It is a natural duty, rather permitted than enjoined by any municipal laws, nature in this respect working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defense of the persons of his children.<sup>24</sup>

9. **Maintenance.**—A parent is bound to maintain his children, that is, to supply them with sufficient food and clothing and a proper lodging.<sup>25</sup> He must maintain them in a manner in keeping with his wealth and social position;<sup>26</sup> and while he is not compelled to provide them with luxuries, he will not be permitted to afford them only a bare subsistence.<sup>27</sup> The duty of a parent to maintain his child is absolute, and an infant who lives with its parent, who is amply able to maintain it, is not liable to the parent for maintenance even when it expressly agrees to pay therefor.<sup>28</sup>

The parent is under the natural obligation to furnish his child with necessary and suitable wearing apparel and food, if he be of sufficient ability, and, if he neglect his duty, any one can supply the child.<sup>29</sup> The law in such case will imply a promise upon the part of the father to pay for the necessities, and he will not be heard to allege the contrary; but, if he have not been derelict in his duty, no one has the right to charge the father with supplies for the child, that he or the

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<sup>24</sup> 1 Black. Comm. p. 450.

<sup>25</sup> 14 Ill. App. 277 (1883).

<sup>26</sup> 2 Kent's Comm. 189.

<sup>27</sup> 1 Black. Comm. 447.

<sup>28</sup> 3 Colo. App. 338 (1893).

<sup>29</sup> 33 Pa. 50 (1859).

child may judge that the child needs, without authority from the parent so to do.<sup>30</sup> This duty to maintain devolves in the first instance upon the father who is the head of the family, and during his life he will be compelled to support the children of the marriage, even though he be imprisoned for crime, and, also, in some cases, where he is divorced from his wife and she has the custody of the children.<sup>31</sup> A father is compelled to support his child even when the child has an estate of its own, but if the child have a considerable estate and the parents be comparatively poor, the court will permit part of the income of the child's estate to be used in fitting it for a higher position in the community, by means of a better education, etc., than its parents in their more limited condition would be able to afford it.<sup>32</sup>

The obligation of the father to support his child terminates when the child is of age, no matter how wealthy the father may be, unless the child be in such a condition that it would become a pauper. On the death of the father, the duty devolves upon the mother, whose obligation is substantially the same as that of the father, except with regard to the maintenance of a child who has an estate of its own. But, although a mother is compelled to maintain her children in case of the death of the father, yet the court will almost invariably permit an allowance out of the child's estate to assist in supporting it.<sup>33</sup> This difference is due to the more dependent position of the mother and the consequent reluctance of the courts to encroach upon her estate.

**10. Education.**—Not only the child's own interest but the interests of the community demand that a parent should give his child an education. A parent who suffers his child to grow up like a mere beast, to lead a life useless to others and shameful to itself, has conferred a very questionable benefit upon it by bringing it into the world.<sup>34</sup> But the duty of a parent to educate his child extends only to a degree befitting the position the parent occupies in the community;

<sup>30</sup> 14 Ill. App. 277 (1883).

<sup>31</sup> 79 Me. 292 (1887).

<sup>32</sup> 1 Ld. Raym. (Eng.) 699 (1790).

<sup>33</sup> 32 Minn. 385 (1884).

<sup>34</sup> Puff. *Law of Nations*, b, 6, c. 2, Sec. 12.

a laborer is not compelled to give his child as high an education as a millionaire. Since the establishment of free schools, however, every child is entitled to a certain amount of education, which is frequently prescribed by statute.<sup>35</sup> In the United States, under the public-school system, a parent is relieved, to some extent, of the duty. In some states, the father of a child unlawfully excluded from a public school may compel the school board to admit the child to the school,<sup>36</sup> subject, however, to reasonable school regulations as to the right to expel.<sup>37</sup> In some states, statutes require children of certain ages to attend school.<sup>38</sup> In England, under a statute, a parent may be prosecuted for neglecting to educate his child.<sup>39</sup>

The religious education of the child is also governed by the parent until the child has reached years of discretion, when it may itself determine its religious preferences. In the United States, it seems that the matter of the religious education of children has not been interfered with, to any great extent, by the courts.<sup>40</sup> Judicial opinion, so far as it has been announced, declares that the courts have no jurisdiction over the religious discipline and instruction of children, and that a father has no right to control or interfere with the rights of conscience of his minor child who has arrived at the age of discretion.<sup>41</sup> In England, the law gives great weight to the right of the father to have his children educated in his own religion, both during the father's lifetime and after his death. Where no abandonment by the father is shown, the mere fact that a child will be better off or more contented under other people's care will not justify its instruction in a creed other than the father's; but when abandonment is proved, the question turns upon the welfare of the child.<sup>42</sup>

A parent may apprentice his child to learn some art, trade, profession, or manufacture. The child is thus bound out by

<sup>35</sup> 4 Md. Ch. 149 (1853).

<sup>36</sup> 18 Mich. 400 (1869).

<sup>37</sup> 105 Mass. 475 (1870).

<sup>38</sup> Stats. Pa. and N. Y.

<sup>39</sup> L. R. 7 Q. B. Div. (Eng.) 502 (1881).

<sup>40</sup> 15 Am. L. Reg. N. S. 359.

<sup>41</sup> 2 Clark (Pa.) 36 (1843).

<sup>42</sup> L. R. 8 Ch. (Eng.) 622 (1873).



an indenture by which its master becomes bound to instruct it. But a parent may not apprentice his child upon terms evidently injurious to the child's interest, or to a trade or occupation which would degrade it from the rank and character to which its condition and circumstances might fairly entitle it; and a parent may not assign the services of his child for the benefit of himself (the parent).<sup>43</sup>

It has been held that the theory of apprenticeship is that of education and not that of master and servant. However, by the contract of apprenticeship the relation created between the parties (the master and child apprenticed) is that of master and servant, the principles governing that relation being usually treated under that title, and that method has been followed in this Course.<sup>44</sup>

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### RIGHTS OF PARENTS

**11. Custody of Children.**—As a general rule, the father is entitled to the custody of his children since he is legally bound to support and educate them,<sup>45</sup> and his domicile is their domicile, that is, they are regarded by the law as residing where he resides, no matter where they may actually be.<sup>46</sup> But such right of the father (or mother) to the custody of the child is not absolute; such custody is referable to its interest and welfare, and is to be selected by the court, in case of dispute, in the exercise of a sound judicial discretion, irrespective of the claims of either parent.<sup>47</sup> In case of the death or unfitness of the father, the next natural custodian is the mother, who assumes the custody of all the rights, duties, and obligations of the father, except that she may claim assistance in supporting the children from their estate. She must support and educate them, is entitled to their services and earnings, and they owe to her the same duty of obedience, and the like, they owe to the father.<sup>48</sup>

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<sup>43</sup> 1 Mas. (U. S.) 77 (1816).

<sup>44</sup> See *The Law of Master and Servant: Apprentices*.

<sup>45</sup> 7 Lanc. Law Rev. (Pa.) 391 (1890).

<sup>46</sup> 42 Mich. 509 (1880).

<sup>47</sup> 3 Mas. (U. S.) 482 (1824).

<sup>48</sup> 50 N. Y. Supp. 1,013 (1898).

The state has an interest in the proper nurture and education of the children of its citizens and will consequently bestow their custody in the manner best fitted to subserve their welfare and its interests. Consequently, when a dispute arises with regard to the custody of a child, and the court is asked to lend its aid to put the infant into the custody of the father or mother, and to withdraw it from other persons, it will look into all the circumstances and ascertain whether it will be for the real permanent interest of the infant; and, if the infant be of sufficient discretion, it will also consult its personal wishes. It will free it from all undue restraint, and endeavor as far as possible to administer a conscientious parental duty with reference to its welfare.<sup>49</sup>

The right to the custody of a child may be transferred by the parents to some one else by a contract or agreement to that effect. Therefore, whenever it is for the best interests of a child that neither parent should have custody of it, it will be placed in the charge of a third person.<sup>50</sup> And a father may forfeit his right to the custody of his children by refusing to support them, or by such misconduct as to endanger their moral and religious welfare if they remain under his influence; the mother, also, may forfeit her right in a similar manner.<sup>51</sup>

**12. Illegitimate Children.**—An illegitimate child is one born out of lawful wedlock, or in wedlock but under such circumstances as would render its legitimacy impossible.<sup>52</sup> The mother is the proper one to have the custody of her illegitimate child; but when the child reaches years of discretion, it may choose between the father and the mother.<sup>53</sup> If the mother be dead, and the father be a suitable person, the custody of the child will be given to him.<sup>54</sup> Formerly, a father of an illegitimate child was not bound to support it; this duty was incumbent upon the mother, but, by statutes in nearly all jurisdictions, this is altered and

<sup>49</sup> 3 Mas. (U. S.) 482 (1824).

<sup>50</sup> 2 Kent's Comm. 205.

<sup>51</sup> 59 Ga. 555 (1877).

<sup>52</sup> 1 Black. Comm. 454.

<sup>53</sup> 42 E. C. L. (Eng.) 288 (1841).

<sup>54</sup> 106 Pa. 574 (1884).

the father of an illegitimate child may be compelled to support it.

Under the old common law, the rights of an illegitimate child were very few, only such as he could acquire, for he could inherit nothing, being looked upon as the son of nobody. By statute, where the parents of an illegitimate child intermarry and recognize and treat such child as their own, it will render the child legitimate, the same as if born in lawful wedlock;<sup>55</sup> the reciprocal rights and duties of parent and child will necessarily have to exist, and the child will take the settlement of the father, as one of the legal consequences resulting from such act of legitimation.<sup>56</sup>

**13. Effect of Divorce of Parents.** — In case of divorce of parents, the court usually makes an order with regard to the custody of the children of the marriage. As a general rule, that custody is given to the innocent party. Other things being equal, the boys are put in charge of the father, the girls in that of the mother. Very young children are left to the mother's care, unless she be notoriously unfit to have charge of them. But a decree of divorce giving the custody of the infant children to the mother, either temporarily or permanently, will not relieve the father from his obligation to support them. He is bound to maintain them so long as they are too young to earn their own livelihood, and the mother will be allowed to recover from him her reasonable and proper advances for their support since the divorce, and will be entitled to an order for their future support.<sup>57</sup>

Where a mother has the custody of the children, and the father brings suit to secure their custody himself, if he agree that the mother shall keep the children, pending the controversy, he is liable for necessities supplied to them while in her custody.<sup>58</sup> On the other hand, where a mother, who has deserted her husband, retains her child

<sup>55</sup> 26 Vt. 653 (1854).

<sup>57</sup> 42 Ark. 495 (1883).

<sup>58</sup> See *The Law of Property: Inheritance*.

<sup>58</sup> 7 Daly (N. Y.) 164 (1877); 7 N. H. 571 (1835).

in her own custody, she cannot, after divorce obtained by the husband on the ground of such desertion, maintain an action against him for the support and maintenance of the child.<sup>59</sup>

**14. Statutory Provision for Custody.** — Children who have no parents (orphans), or those whose parents for any reason are unable or unwilling to control them, or to support or educate them properly, so that they are in danger of becoming menaces or burdens to society, may be committed to charitable institutions, in the manner provided by statutes, in some of the United States.<sup>60</sup> These statutes are not penal; the restraint which they authorize is not in the nature of punishment. They are provisions of the state acting as the father of its people for the care of neglected children, and are intended simply to supply the necessary parental care and control of which they are destitute. They do not punish the child by confining it, nor deprive it of its proper share of liberty; they only recognize and regulate, as do the statutes relating to guardianship and apprenticeship, the parental custody which is a necessary incident of infancy. Consequently, an infant accused of crime must be committed according to the criminal law, and not under these statutes.<sup>61</sup> In some states, statutes provide for imprisoning criminals under a prescribed age in local prisons instead of penitentiaries;<sup>62</sup> and, in other states, reformatories and houses of correction are provided for the reformation of infants found guilty of offenses against the law.<sup>63</sup>

Provision is made by statutes in many states for punishment for the abandonment of infants, for trafficking in them, for enticing them away from their parents, for kidnapping them to extort money from their parents, and for wilful and negligent abuse of them, and for the inspection of infant boarding houses; provision is also made by statutes, in some states, prohibiting the employment of

<sup>59</sup> 144 Mass. 25 (1887).

<sup>62</sup> 24 Ill. 340 (1860); 71 Mo. 288 (1879).

<sup>60</sup> Stat. Md. 1886, c. 57, Sec. 1, and stats. of other states.

<sup>63</sup> 29 Tex. App. 141 (1890); 19 Wash. 306 (1896).

<sup>61</sup> 141 Mass. 203 (1886).

infants under a certain prescribed age in hazardous occupations, in manufactories, mines, or as acrobats, and such as are subversive of their morals, as theatrical exhibitions, dance halls, or places where liquors are sold.<sup>64</sup>

**15. Parent's Right to Control.**—A parent may reasonably chastise and correct his child; and this right is extended to persons standing *in loco parentis*, such as a school teacher, a guardian, or the master of an apprentice. The right of parents to chastise their refractory and disobedient children is so necessary to the government of families, and to the good order of society, that no moralist or law-giver has ever thought of interfering with its existence, or of calling upon them to account for the manner of its exercise upon light or frivolous pretenses. But at the same time the law has created and preserved this right, in its regard for the safety of the child, by prescribing bounds beyond which it shall not be carried. In chastising a child the parent must be careful that he does not exceed the bounds of moderation and inflict cruel and merciless punishment; if he do so, he is a trespasser and is liable to be punished criminally. It is not the infliction of punishment but the excess which constitutes the offense, and this excess is to be determined by the particular facts of each case.<sup>65</sup>

**16. Parent's Right to Services.**—The right of a parent to the services of his children during their minority is undisputed. It results at once from the parental duty and obligation to maintain them, and from the deep interest, moral, religious, and social, which the parental relation necessarily involves in the comfort, happiness, and preservation of offspring. Accordingly, a father is entitled to the advantages and profits accruing from the personal labor of his children, while they live with him and are maintained by him. And if, by force or fraud, abduction, or seduction,

<sup>64</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, p. 316, and the cases and stats. there cited, notably the N. Y. Laws of 1886, c. 409, Sec. 2, also of 1889, c. 560, and 1892, c. 673; N. Y. Penal Code, Sec. 292, as amended by the laws of 1886, c. 31; 51 Mo. App. 129 (1892); 107 Ind. 483 (1886); Pa. P. L. 1879, Sec. 3, p. 142.

<sup>65</sup> 2 Humph. (Tenn.) 283 (1841).



they be withdrawn from his power or protection, so that he loses the comfort of their society or their services, he is entitled, upon the plainest principles of justice, to an action for damages for the wrong done to him.<sup>66</sup>

The parent has a right to sue for the services of his minor child, as the child is regarded as a hired laborer and the work of the child is considered the work of the parent;<sup>67</sup> but the parent loses his right to wages when he fails to support his child, for by refusing him support the parent thereby emancipates his child.<sup>68</sup> A parent may recover wages earned by his infant son in an unlawful business, if he knew nothing of its nature during the continuance of such employment.<sup>69</sup> The parent cannot, however, recover the wages specified in the contract entered into by his minor son, unless the same were carried out, or broken for good reason. And where an infant enters into a contract unknown to its parent, the latter, upon discovery of the same, must either prohibit its continuance, in which event he may recover what the services were worth, or he must see that the contract is carried out; which done, the compensation agreed upon may be recovered.<sup>70</sup> A mother is in all respects capable of receiving, or suing to recover, the wages for her child's services if she be a widow and discharge her parental duties toward her child;<sup>71</sup> and the fact that the minor is not dependent upon the mother, but contributes to her support, does not alter the rule or deprive the mother of the right which the law confers.<sup>72</sup>

**17. Parent's Right to Child's Property.**—A parent has no authority, as guardian by nature of his minor child, to receive his property.<sup>73</sup> Guardianship by nature confers no right whatsoever upon the parent to intermeddle with the property of his children; it is a mere personal right to the custody of the person of his children.<sup>74</sup> Where a child has property, a guardian should be appointed to manage

<sup>66</sup> 4 Mas. (U. S.) 380 (1827); 14 Allen (Mass.) 497 (1867).

<sup>67</sup> 5 Dutch. (N. J.) 117 (1860).

<sup>68</sup> Tyler Inf., p. 201.

<sup>69</sup> 2 Gray (Mass.) 257 (1854).

<sup>70</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 14, p. 756, citing 24 Vt. 513 (1852).

<sup>71</sup> 37 Conn. 435 (1870).

<sup>72</sup> 5 Lans. (N. Y.) 337 (1871).

<sup>73</sup> 34 Ala. 15 (1859).

<sup>74</sup> 1 Black. Comm., p. 460; 2 Kent's Comm. 217; 1 Bouv. Inst. 139.

such estate and see that it is protected,<sup>75</sup> and that no undue influence is used upon the child to affect its interest concerning its estate.<sup>76</sup> Whatever, therefore, an infant acquires, which does not come to it as a compensation for services rendered, belongs absolutely to it, and its parent cannot interpose any claim to it, either as against the child or as against third persons who claim title or possession from or under the infant.<sup>77</sup>

When parents furnish their minor children with clothing, it is not that they shall have the absolute control of it, to sell, give away, or destroy at pleasure, but it is that they may enjoy the use of it during the will of the parent.<sup>78</sup> The right of property and possession still remains in the parent, and its possession may be resumed at any time, when desired.<sup>79</sup> But where the parent gives the clothing to his child with the intention of making it a gift,<sup>80</sup> or where he gives a child money and it purchases clothing,<sup>81</sup> under such circumstances the clothing belongs to the child and not to the parent.

**18. Parent's Right to Recover.**—1. *For Injuries to a Child.*—Where a child is injured, the parent has a right to recover against the wrong-doer, on the theory of the loss of services caused to him by the injury to his child.<sup>82</sup> In order to recover, the child must be considered, for the purposes of the suit, a servant of the parent, and the damages recoverable are for loss of services, for nursing, and for surgical and medical attendance.<sup>83</sup> The rule of law is that the father is entitled to compensation merely for the pecuniary loss he has sustained; not compensation for his lacerated feelings or his disappointed hopes, for the law cannot compensate these in money, but pecuniary indemnity for pecuniary losses.<sup>84</sup> What he spent to cure his child and what profit might have accrued to him from his services, more

<sup>75</sup> 21 Vt. 539 (1849); 3 Pick. (Mass.) 213 (1825).

<sup>76</sup> See *The Law of Guardian and Ward*.

<sup>77</sup> 14 Allen (Mass.) 497 (1867).

<sup>78</sup> 21 Ill. 620 (1859).

<sup>79</sup> 45 Barb. (N. Y.) 21 (1867).

<sup>80</sup> 21 Ill. 620 (1859).

<sup>81</sup> 4 Cush. (Mass.) 114 (1849).

<sup>82</sup> 7 M. & G. (Eng.) 1,041 (1844).

<sup>83</sup> 17 Ind. 323 (1861); 21 Wend. (N. Y.) 615 (1839).

<sup>84</sup> 48 Pa. 326 (1864).

than can be realized after his injury, are the proper elements of a verdict for damages.<sup>85</sup>

In England and the United States, certain statutes enlarge the rights of widows, dependent parents, and others, in torts occasioned by the negligence of railroad companies and other common carriers. Under such statutes, it is frequently provided that, where a child is killed, the child's administrator may sue for the parent's benefit. "The English statute<sup>86</sup> has given rise to suits of this kind; but the rule is laid down that such actions are not maintainable without some evidence of actual pecuniary damage, some loss of service. Though natural equity may assert otherwise, the common law does not permit a father to recover for injuries causing the immediate death of his child, either on the ground of loss of service or for burial expenses. And since the parent's right of suit is founded upon the loss of a child's services, irrespective of the child's own suit for damages, there are circumstances under which such suits might be brought, notwithstanding the child was of age, contrary to the general rule, or where one stood to a child not his own in place of a parent."<sup>87</sup>

2. *For Abducting a Child.*—The father and, after his death, the mother, or one standing in place of a parent, has the right of action against any person who entices away or abducts a child, or for harboring and keeping the child after it has quitted its home; besides, to harbor or entice away an innocent child for immoral and corrupt purposes is an outrage criminally dealt with.<sup>88</sup>

According to some authorities, the action of the parent is based on the loss of the child's services;<sup>89</sup> by other authorities the claim is made that the loss of the child's services forms no essential ingredient in the cause of action, but

<sup>85</sup> 31 Pa. 372 (1858).

<sup>86</sup> Stat. 9 & 10 Vict., c. 93 (Lord Campbell's Act).

<sup>87</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 259, citing 4 Hurl. & Nor. (Eng.) 653 (1859); 54 Pa. 495 (1867); L. R. 8 Ex. (Eng.) 88 (1873), and cases there cited; 60 Ga. 320 (1878); 60 N. H. 20 (1880).

<sup>88</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 260.

<sup>89</sup> 4 Litt. (Ky.) 25 (1823).

that the true ground of action is the outrage and deprivation, the injury sustained by the parent in the loss of his child, the insult offered to his feelings and the agony he must suffer, and the loss of the comfort and society of the child.<sup>90</sup> In support of this theory, it is claimed a child may be so tender or of a constitution so delicate as to be incapable of rendering any service.<sup>91</sup> However, there seems to be no reason why a parent, or one standing *in loco parentis*, may not sue on either ground, but he cannot do so on both. A person cannot take contradictory positions and, where he has a right to choose one of his modes of redress, his election of one will preclude him from adopting the other.<sup>92</sup>

A parent loses the right to recover for enticing away or abducting his child by forfeiting his right of control over his child's person, and this forfeiture will result if he turn it out of his house, refuse to maintain it, or abandon all care of it.<sup>93</sup> The principles which are sanctioned by the most approved elementary writers on the law, as well as judicial decisions, are that by renunciation of the parental power (by abandoning all care of his child, refusing to maintain it, etc.) the child becomes, in a qualified sense at least, independent and competent to act for itself.<sup>94</sup> To allow a parent control over his child while he contributes nothing to its support or protection would be giving an extension to the parental power that is neither sanctioned by the law of nature nor by municipal law. Therefore, where a child is left to its own resources, supporting itself by its own industry, and the parent has abandoned all care of it, no action for abduction of the child can be maintained by the parent.<sup>95</sup>

A parent has no right of action where his daughter is enticed away for the purpose of marriage, if the marriage be actually and validly consummated;<sup>96</sup> for while the parent has the right of control of his child, a lawful husband's right is

<sup>90</sup> 2 Brev. (S. C.) 276 (1809).

<sup>91</sup> 32 Ohio St. 299 (1877).

<sup>92</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 169, citing 31 Mich. 309 (1875).

<sup>93</sup> 1 Iowa 356 (1855).

<sup>94</sup> 2 Metc. (Mass.) 89 (1840).

<sup>95</sup> 1 Ware (U. S.) 91 (1825).

<sup>96</sup> 4 Litt. (Ky.) 25 (1823).

superior to that of the parent.<sup>97</sup> For a forcible abduction, however, resulting in an imperfect marriage, and aggravated cases of like nature, where, in fact, there is not a valid union, there may be a remedy, the marriage statutes frequently providing penalties for such offenses. "But for drawing children of a suitable age into a marriage which pleases themselves, the law affords no redress; nor can it punish for the sake of parental discipline. And even though the match be unhappy, yet marriage must supersede the filial relation. Nor can a parent sue a school teacher, school trustees, or others, for excluding his children from school; the right of action, if any, being in the child, and there being no real loss of services consequent upon the affront."<sup>98</sup> Where a father and an adult child live in the relation of parent and child, the parent is entitled to recover when such adult child is injured; and, after the death of the husband, the wife has the same right of action.<sup>99</sup> Or in case the husband has deserted his wife, and she is supporting the children of the marriage, as the maintaining parent, she has the right to sue for injuries to one or all of them.

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### DUTIES OF CHILDREN

**19. Duty to Protect and Maintain.**—Whatever duties are enjoined upon children to their parents arise from and rest upon the principle of natural justice and retribution. The natural debt owed by children to those who give them their existence is subjection and obedience during their minority, and honor and reverence ever after. The parents who protected their children in infancy are entitled, in the infirmity of their age, to the protection of their children; and they who by sustenance and education have enabled their offspring to prosper ought in return to be supported by that offspring in case they stand in need of assistance.<sup>100</sup> This natural obligation, however, can only be

<sup>97</sup> 2 Greene (Iowa) 329 (1849).

<sup>98</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 260, citing 130 N. Y. 239 (1891); 23 Pick. (Mass.) 224 (1839); 15 Ind. 73 (1860).

<sup>99</sup> 54 Pa. 495 (1867).

<sup>100</sup> 1 Black. Comm. 453.



enforced in the mode pointed out by statute;<sup>101</sup> the law does not imply a promise from the child to pay for necessities furnished without his request to an indigent parent.<sup>102</sup> In other words, while the parent is obliged to provide necessities to an infant child, an adult child, in the absence of positive statute, or a legal contract on his own part, is not bound to supply necessities to its aged parent.<sup>103</sup>

**20. Duty as Enjoined by Statutes.**—In England and the United States, statutes enforce this imperfect legal obligation to the extent, at least, of relieving municipalities from the support of paupers. The English statutes declare in effect that children, if sufficiently able, must relieve and maintain their parents, if poor, old, lame, impotent, and unable to maintain themselves.<sup>104</sup> This principle is part of the common law of the United States and has been reaffirmed by statutes in some states.<sup>105</sup>

## RIGHTS OF CHILDREN

**21. To Wages for Services Rendered Parent.** While a son resides in his father's family he can make no claim for services rendered, unless there be proof of an express contract of hiring. The law implies no such contract in such cases between parent and child.<sup>106</sup> But a child has a right to his own earnings where the services are rendered, as by a son to his father, at the request of the latter, on the basis of master and servant and not that of parent and child; and the son has a right of action to recover from the father the value of such services.<sup>107</sup> A son who works for his father after he is of age does not thereby acquire a right of action against his father for services rendered, unless there have been a previous contract or agreement to pay on the part of the father.<sup>108</sup>

<sup>101</sup> 12 Iowa 512 (1861).

<sup>102</sup> 45 N. H. 558 (1864).

<sup>103</sup> Schoul. Dom. Rel., Sec. 265, citing Reeve Dom. Rel. 284; 32 Conn. 144 (1864); 1 Stra. (Eng.) 190 (1795).

<sup>104</sup> Stats. 43 Eliz., c. 2, and 5 Geo. I. c. 8.

<sup>105</sup> Schoul. Dom. Rel., Secs. 237, 265.

<sup>106</sup> 30 Pa. 473 (1858).

<sup>107</sup> 12 Pa. 64 (1849).

<sup>108</sup> 16 Pa. 489 (1851).

**22. To Enter Into Contracts.**—The competency of infants to contract forms an important part of our instruction concerning contracts generally, to which the student is referred.<sup>109</sup> Most of the acts of infants are voidable and not absolutely void, but some contracts made by infants, notably those for necessities, are valid, and for making such, infants are liable. In our former treatment, the contracts of infants are divided into (1) those that are valid and bind the infant with or without its affirmance on attaining majority; (2) those that are void absolutely; and (3) those that are voidable and may be ratified by the infant on attaining its majority.<sup>110</sup>

**23. To Bind Parent as Agent.**—The extent to which a child may bind its parent as agent is a limited one. It is stated that, as a rule, a father is not bound by the contracts or debts of his son or daughter, even for necessities, unless the circumstances show an authority actually given or to be legally inferred.<sup>111</sup> To bind the parent for transactions entered into by his child, proof is required of an express promise or circumstances from which a promise may be inferred.<sup>112</sup> Wherever there is no authority to bind the parent, the rule of principal and agent is rigidly enforced.<sup>113</sup>

**24. To Recover for Death of Parent.**—Upon the death of the parent by accident, caused by the negligence or fault of another, the child may maintain an action for loss of support, maintenance, and education.<sup>114</sup> The measure of damages is the pecuniary loss suffered. That loss is what the deceased would have probably earned by his intellectual or bodily labor in his business or profession during the residue of his lifetime, and which would have gone for the benefit of his children, taking into consideration his age, ability, and disposition to labor and his habits of living and

<sup>109</sup> See *The Law of Contracts: Parties to Contracts, Competency, Infants.*

<sup>110</sup> *Ibid.*

<sup>111</sup> 2 Kent's Comm. 192, quoted in Schoul. Dom. Rel. (5th Ed.), Sec. 241.

<sup>112</sup> 110 Ind. 74 (1886); 78 Ill. 230 (1875).

<sup>113</sup> See *The Law of Principal and Agent.*

<sup>114</sup> 57 Pa. 335 (1868).

expenditures.<sup>115</sup> The manner in which suits are instituted for minor children is detailed in another title.<sup>116</sup>

**25. Rights Secured by Emancipation.**—A child is said to be emancipated when it is released from the parental control, when it is freed from its obligations to its parent; and by the operation of emancipation, which is rather a privilege allowed by the parent than a right which may be enforced, the child secures certain rights with which before it was not invested.<sup>117</sup>

Emancipation takes place as a matter of course when the infant attains its majority;<sup>118</sup> also, by marriage, with the parent's consent, by which the new (marriage) relation created, being inconsistent with parental rights, operates as an emancipation from them;<sup>119</sup> also, when the parent abandons all care of the child, or when he forces it to leave the habitation,<sup>120</sup> or when the child is deserted by the parent.<sup>121</sup> And it may take place by agreement either in writing or by parol, between parent and child, by which the parent sells or gives to the child his time and earnings during the whole or part of its minority, or it may be inferred from the conduct of the parent in permitting the child to use its time as though it were emancipated.<sup>122</sup>

When a child is emancipated, the rights and duties that the parent owes to it and the reciprocal rights and duties that the child owes to the parent are severed and ended, and the child is *sui juris*—placed in the position of full age and capacity.<sup>123</sup> Whatever operates as a release from parental control necessarily terminates parental rights of service, and the emancipation of the minor from legal parental authority, either by the voluntary act of the parent or by operation of law, puts an end to the legal claims of the parent to the minor's earnings, and such earnings belong to the

<sup>115</sup> 84 Pa. 419 (1877).

<sup>116</sup> See *The Law of Guardian and Ward: Guardian Ad Litem and Next Friend*.

<sup>117</sup> Eversley Dom. Rel. (2d Ed.), p. 552.

<sup>118</sup> 23 Vt. 328 (1851).

<sup>119</sup> 24 Me. 531 (1845).

<sup>120</sup> 148 Mass. 550 (1889).

<sup>121</sup> 66 Me. 78 (1876).

<sup>122</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 17, pp. 395, 396, citing 6 Conn. 547 (1827); 34 Conn. 259 (1867).

<sup>123</sup> 63 N. H. 415 (1885).

emancipated child.<sup>124</sup> After emancipation a parent may make contracts with his child and become liable to pay it wages, for then the child has the right to its own wages, the disposition of its own time, and, in a great measure, the control of its own person.<sup>125</sup>

## LIABILITY

**26. Of Father for Torts of Child.**—Generally, the parent is not liable for the torts, or civil wrongs, of his child unless he consent to or ratify the acts committed.<sup>126</sup> Where a minor son who lives with his father and is under his control commits wrongful acts which are not authorized by the father, are not done in his presence, have no connection with his business, are not ratified by him, and from which he receives no benefit, the father is not liable.<sup>127</sup> But, where a child is engaged in its father's service, and, in doing work authorized by the parent, negligently causes a loss or injury to another, the father will be liable. Thus, where a minor son, under contract with his father to clear a parcel of land, did it so negligently that a neighbor's property was destroyed by fire, the parent was held liable in damages.<sup>128</sup>

A parent is liable for trover and conversion (keeping goods for one's own use that have been entrusted to him) committed by his child, where the parent has knowledge of the conversion and continues to enjoy the benefit of it.<sup>129</sup>

**27. Of an Infant for His Torts.**—As a rule, an infant is liable for the torts or civil wrongs committed by it, such as slander, assault and battery, and trespass, in the same manner as an adult.<sup>130</sup> The privilege of infancy is a shield and not a sword.<sup>131</sup> Although the law will protect an infant from the imprudent obligations and contracts which it has entered into, yet it will not protect it from the results of the **wrongs** which it has inflicted upon

<sup>124</sup> 23 Me. 569 (1844).

<sup>125</sup> 131 N. Y. 315 (1892).

<sup>126</sup> 43 Mo. 119 (1868).

<sup>127</sup> 13 Kans. 348 (1874).

<sup>128</sup> 86 Ind. 476 (1882).

<sup>129</sup> 156 Pa. 410 (1893).

<sup>130</sup> 66 Mo. 346 (1877); 59 Ind. 130 (1877).

<sup>131</sup> 3 Burr. (Eng.) 1802 (1765).

others.<sup>132</sup> And it is claimed that this liability of the infant is not affected because the wrong act may have been committed by command of the parent or guardian,<sup>133</sup> and, also, that an infant's liability extends to trespass which it procures another to commit.<sup>134</sup> But it cannot be held responsible for wrongs committed by one assuming to act under its implied authority,<sup>135</sup> since it cannot legally create an agent; its liability extends only to acts committed by itself or under its express direction.<sup>136</sup>

Where the action is more of contract than tort, that is, if the tort be a result of the breach of contract, the infant is not liable. Acts, however aggravated, which merely establish a breach of contract on the part of an infant, are manifestly insufficient to render the infant liable in tort. To render an infant, who has hired a horse, liable in an action of trespass, it must do some wilful and positive act which amounts to an election on its part to disaffirm the contract; a bare neglect to protect the animal from injury and to return it at the time agreed upon is not sufficient.<sup>137</sup> If it wilfully and intentionally injure the animal, an action of trespass will lie against it for the tort, but not if the injury complained of occurred in the act of driving the animal through his unskillfulness and want of knowledge and discretion.<sup>138</sup> So, where an infant hires a horse to go to one place and goes to another, it will be held liable for the value of the horse, if the horse be killed by such misuse. So long as the infant keeps within the terms of the bailment, its infancy is a protection to it whether it neglect to take proper care of the horse or to drive him moderately; but when it departs from the object of the bailment, it amounts to a conversion of the property, and it is liable as much as if it had taken the horse in the first instance without permission.<sup>139</sup>

Where an infant purchases goods with fraudulent intent, and procures the delivery by fraud, it will be liable in an

<sup>132</sup> 29 Barb. (N. Y.) 218 (1858); 1 Bing. (Eng.) 692 (1835).

<sup>133</sup> 10 Vt. 71 (1838); 46 Me. 362 (1859).

<sup>134</sup> 96 N. C. 392 (1887); 16 Mass. 889 (1820).

<sup>135</sup> 77 Ill. 178 (1875).

<sup>136</sup> 4 Robt. (N. Y.) 553 (1869); 101 Mass. 360 (1869).

<sup>137</sup> 1 Hun (N. Y.) 578 (1874).

<sup>138</sup> 50 N. H. 235 (1870).

<sup>139</sup> 23 Vt. 354 (1851).



action for tort. The mere fact that it made the contract, and by fraudulent means obtained possession of the property, will not shield it from liability.<sup>140</sup> Where property is bailed to a minor, and it uses the property for a different purpose than that for which it was bailed, the bailment is thereby determined and the minor is liable for trover and conversion; the fact that the infant secured the property by contract will not excuse it from the wrongful conversion.<sup>141</sup>

**28. False Representation of Age.**—It is claimed that an infant who makes a false representation as to its age is not bound by such assertion, that the doctrine of estoppel is inapplicab'le to infants. It is claimed by some authorities to be settled law that no action, as for deceit, can be maintained against an infant grounded upon a false representation of its age.<sup>142</sup> Other authorities present a contrary and more consistent view. The view taken by the court in one case is: Where an infant fraudulently and falsely represents that it is of full age, it is liable for the injury resulting from the tort. In holding it responsible for the consequences of its wrong, an equitable conclusion is reached which strictly harmonizes with the general doctrine that an infant is liable for its torts.<sup>143</sup> This position is supported by other cases, in which it is held that if an infant falsely allege that it is of full age, for the purpose of inducing another person to purchase and take a deed of its lands, it would be liable to respond in damages for an injury which might result to the purchaser in consequence of the deceit;<sup>144</sup> and a minor who obtains property upon representation that it is of full age is liable in an action of tort, either to recover the property back, or to recover damages upon the ground that it was wrongfully obtained.<sup>145</sup> Hence, the better rule appears to be, that an infant is liable for its false representations, and especially where the infant afterwards acts in accordance with its previous representations. The view from an equitable standpoint is: Whenever an infant who has arrived at

<sup>140</sup> 59 Ill. 342 (1871).

<sup>141</sup> 16 Vt. 390 (1844).

<sup>142</sup> 5 Sandf. (N. Y.) 224 (1851).

<sup>143</sup> 9 N. H. 441 (1838).

<sup>144</sup> 38 Ill. 145 (1865).

<sup>145</sup> 1 Daly (N. Y.) 334 (1863).

years of discretion, by direct participation or by silence when it was called upon to speak, has entrapped a party ignorant of its title or its minority, into purchasing its property from another, it will be estopped in a court of chancery from setting up such title.<sup>146</sup>

**29. Responsibility for Crime.**—The absolute presumption of law is that an infant within the age of seven years is incapable of distinguishing good from evil, and, therefore, the law does not permit a child of such tender years to be convicted and punished for crime.<sup>147</sup> Between the age of seven and fourteen years an infant is deemed *prima facie* capable of mischief;<sup>148</sup> but the assumption of guilty intention, the question whether the infant be possessed of sufficient capacity to understand the nature of crime, is subjected to the effect of proof.<sup>149</sup>

An infant over the age of fourteen years is considered *prima facie* capable of crime like any other person.<sup>150</sup> The law assumes that the legal incapacity of an infant to commit criminal offenses ceases when the infant attains the age of fourteen, but it is an assumption that is also subjected to the effect of proof concerning the fact of capacity to understand the nature of crime.<sup>151</sup>

Where a statute creates an offense, infants under the age of legal capacity are not presumed to have been included; yet where an act is denounced as a crime, even felony or treason, it extends as well to infants, if above the age of fourteen years, as to others. And a child under fourteen may be within the fair scope of a particular statute of misdemeanor.<sup>152</sup>

**30. Competency to Testify.**—When a child under the age of fourteen is offered as a witness, the court will inquire whether the child fully comprehends the nature and binding effect of an oath, and the witness will not be permitted to

<sup>146</sup> 54 Miss. 121 (1876); 53 N. J. Eq. 258 (1895).

<sup>147</sup> 4 Black. Comm., pp. 22, 23.

<sup>148</sup> 2 Pick. (Mass.) 380 (1824).

<sup>149</sup> 56 N. W. Rep. 403 (1893).

<sup>150</sup> 41 Vt. 585 (1869).

<sup>151</sup> 89 Ga. 188 (1892); 1 Bish. Crim. Law, Vol. 1, p. 371.

<sup>152</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 395, citing 88 N. C. 650 (1833).

testify unless the ability in the child in this respect be established.<sup>153</sup> The question is one of discretion for the court. Wherever a child displays sufficient intelligence to observe and narrate, it can be admitted to testify;<sup>154</sup> the law fixes no limit of age which will itself exclude.<sup>155</sup> A child of five years has been admitted to testify, and a female child of eight was held competent to testify in a prosecution for a criminal assault upon her.<sup>156</sup>

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## ADOPTION OF CHILDREN

**31. Definition and History.**—Adoption is the act by which a person takes the child of another into his family and treats it as his own; the admission of a child to some or all of the privileges of natural kinship or membership.<sup>157</sup> It is a juridical act creating between two persons certain relations, purely civil, of paternity or affiliation.<sup>158</sup>

Adoption is not recognized by the common law, but exists in the United States only by the authority and under regulation of statutes.<sup>159</sup> It was practiced in the remotest antiquity and was established to console those who had no children of their own.<sup>160</sup> It is still practiced, under various restrictions, in many European countries which derive their jurisprudence from the ancient Roman (civil) law which sanctioned it,<sup>161</sup> being under that law an act by which a person undertook to rear the child of another, and appoint such child his heir. It was introduced from the laws of France and Spain, respectively, into Louisiana and Texas, and was thus established in territory subsequently acquired by the United States.<sup>162</sup> Being repugnant to the principles of, and not recognized by, the common law of England, it never was in the power of an individual to adopt the child of another as his own, in certain

<sup>153</sup> 7 C. & P. (Eng.) 320 (1835).

<sup>154</sup> 2 Brew. (Pa.) 404 (1868).

<sup>155</sup> 3 C. & P. (Eng.) 598 (1829).

<sup>156</sup> 50 Ala. 164 (1874).

<sup>157</sup> Bouv. Law Dict.; Cent. Dict.

<sup>158</sup> Bouv. Law Dict.

<sup>159</sup> 70 Mich. 297 (1888).

<sup>160</sup> 89 Pa. 361 (1879).

<sup>161</sup> Cicero Pro Domo Pontifices.

<sup>162</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 726, citing 13 La. Ann. 516 (1858); 67 Tex. 200 (1886).

states, until authorized by statute,<sup>163</sup> by which the act of adoption and the mode of proceedings to effect it are regulated.

**32. Mode of Adoption.**—To adopt a child, the usual requisite of the statutes is the consent of the natural parent, or existing custodian (such as guardian or next friend), unless there be strong reasons for dispensing with it, judicially considered.<sup>164</sup> In some states, the consent of the child is required by the statutes, if over the age of fourteen years; in other states, if the child be over the age of twelve years its consent must be obtained;<sup>165</sup> and, in most states, statutes require the consent of the wife or husband of the adopting parent, if capable of giving consent. In some states, a written instrument must be executed and recorded, and the proceedings are in the nature of a solemn contract. In most states, the statutes provide that a petition shall be presented to the probate, or like court, reciting the requisite facts, which form the basis for a decree by the court conferring upon the child the general status of a child of the adoptive parent, by which decree the child is qualified to inherit from the adoptive parent.<sup>166</sup>

Usually adoption relates to minors and not to adults. By many statutes, any minor may be adopted. In some states, the word child, as used in the statutes, is construed to mean a minor child;<sup>167</sup> but some statutes authorize the adoption of adults.<sup>168</sup> The person who adopts a child is not required to possess any particular capabilities, so long as he is a person of full age and a resident of the state.

<sup>163</sup> Pa. P. L. 1855, p. 430, and stats. of other states.

<sup>164</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 232, citing 37 N. J. Eq. 245 (1883).

<sup>165</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 730, citing the statutes.

<sup>166</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 727, citing 84 Ala. 393 (1887).

<sup>167</sup> 14 R. I. 38 (1882).

<sup>168</sup> 132 Ind. 294 (1892).

# THE LAW OF GUARDIAN AND WARD

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## GUARDIANSHIP

**1. Definitions.**—A **guardian** is one to whom the law entrusts the duties of caring for and protecting the person or property, or both, of a minor child. A **ward** is a minor child, the care of whose person or property, or both, is entrusted to another; one who is under guardianship by legal direction or appointment.

**2. The Relation.**—The law has created a power or protective authority over those whose weaknesses on account of their youth and feebleness of will incapacitate them from protecting themselves and acting for themselves in the matters which pertain to their affairs. This authority is called **guardianship**, and, while the term is usually applied to minor children, in which sense it forms the specific purpose in the present instruction, it is applied, also, to lunatics, habitual drunkards, and the like. When the care of one of these last named classes is imposed on another individual the latter is usually designated the **committee** of the one to be cared for.<sup>1</sup>

The law of guardianship is most naturally divided into guardianship of the person, which is essentially that of parent and child, and guardianship of the estate, which answers the purpose of trusteeship, to the extent, at least, of the management of the property of the minor child. But

<sup>1</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 283.



this distinction does not prevent the same person from officiating both as guardian of the person and of the estate. So, too, they may be kept distinct, that is, there may be a guardian for the one purpose and a guardian for the other, or it may be only necessary to constitute a person the guardian to manage the minor's estate. Besides, as in other trusts, there may be joint guardians.<sup>2</sup>

### CLASSIFICATION

3. The simplest classification of guardians is into the *natural*, who is either the father or mother of the minor, and the *appointed*, or judicial, guardian, one named by the court on petition, as provided by statute.

4. **Guardian by Nature and Nurture.**—The natural guardian of a minor—the only natural guardian possible—is the father, and, on his death, the mother.<sup>3</sup> This kind of guardianship belongs exclusively to the parents, and the rights and duties of the guardian by nature are the same as those of parent and child.<sup>4</sup> In default of both parents, the natural guardian of a minor is the grandfather or grandmother.<sup>5</sup> At common law, the parental control extends only to the person of the minor; the father as guardian by nature has no right to the personal or real estate of his child, except such as is given him by statute.<sup>6</sup> Hence, when property becomes vested in the child, it is necessary to have a guardian appointed.

5. **Guardian by Appointment.**—The greater number of guardians, by far, are those appointed by court, in conformity with statutes by which their powers and duties are regulated. In the absence of special provisions, their rights and duties are governed by the general legal principles applicable to the relation of guardian and ward.<sup>7</sup> Guardians commonly designated as statutory guardians, or guardians

<sup>2</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 283.

<sup>3</sup> Co. Litt. 88 b.

<sup>4</sup> See *The Law of Parent and Child*.

<sup>5</sup> 114 U. S. 218 (1884).

<sup>6</sup> 14 Wend. (N. Y.) 631 (1836).

<sup>7</sup> Bouv. Law Dict.

by statute, are of two kinds, (1) those appointed by deed or will, and (2) those appointed by court in pursuance of some statute.

**6. Testamentary Guardian.**—A guardian appointed by the deed or last will of the father of a minor child is a testamentary guardian.<sup>8</sup> He supersedes the claims of all other guardians and has control of the person and of the real and personal estate of the child until it reaches full age; in the case of a male ward the guardianship continues during the ward's minority whether he marry or not.<sup>9</sup> In England, the power and appointment of testamentary guardians is of statutory creation,<sup>10</sup> and it has been extensively adopted in the United States, although, in some states, the appointment is limited to the will of the father. Under it, the father might thus dispose of his children, born or unborn, but not of his grandchildren; nor does it matter whether the father be a minor or not.<sup>11</sup>

**7. Guardian by Chancery.**—The guardian by chancery is unknown to the common law; it is the creation of statute and is well established in practice. In England, by virtue of the sovereign power of the king as father of his country, having the power of guardianship over persons under disabilities, the sovereign is presumed to have delegated to the chancellor, the officer appointed to preside over a court of chancery, the prerogative or power to appoint a guardian where there is none. The chancellor, likewise, exercises a superintending control over all guardians, however appointed, removing them for misconduct and appointing others in their stead, but only, it is said, where the minor has property.<sup>12</sup> In the English practice, chancery guardians have assumed such importance as almost to supersede the other kinds, except, perhaps, the testamentary guardian.

An infant is constituted a **ward in chancery** whenever any one brings it in as a party plaintiff or defendant by a

<sup>8</sup> 88 Ga. 722 (1891).

<sup>9</sup> Reeve Dom. Rel. 328.

<sup>10</sup> 12 Car. II, c. 24.

<sup>11</sup> Bouv. Law Dict., citing 7 Ves. (Eng.) 715 (1802); 5 Johns. (N. Y.) 278 (1821).

<sup>12</sup> Bouv. Law Dict., citing Co. Litt. 89; 1 P. Wms. (Eng.) 703 (1721); 2 Kent's Comm. 227; Tiff. Dom. Rel. 300.

bill in equity asking the directions of the court concerning its person or estate, or the administration of property in which it is interested.<sup>13</sup> If an action be commenced in the name of an infant who has property, if an order be made on petition or summons for the appointment of a guardian, if an order be made in like manner for maintenance, or if a fund belonging to an infant be paid into court under the acts for the relief of trustees, such infant becomes a ward in chancery.<sup>14</sup> In the United States, this power resides in courts of equity,<sup>15</sup> but more commonly, by statute, in probate or surrogate courts.<sup>16</sup>

**8. Guardian in Socage.**—Guardianship in socage is a trusteeship at common law as an incident to lands held by socage tenure.<sup>17</sup> It occurs where an infant under fourteen is seized, by descent, of land or other hereditaments holden by that tenure, and is conferred upon the next of kin to the infant who cannot possibly inherit the lands from it. Such guardian was guardian of the person of his ward as well as of his real estate; although the guardianship of the person did not arise unless the infant were seized of lands held in socage, yet when it did arise it extended to hereditaments which do not lie in tenure and to the ward's personal estate.<sup>18</sup>

The duties of a guardian in socage, besides caring for his ward and bringing it up well, include the receipt of the rents and profits of the real estate of his ward, until the latter reaches the age of fourteen years, when the ward can supersede him by a guardian of his own choice.<sup>19</sup> Guardianship in socage has almost passed out of use, even in England, although there are still traces of it in some of the United States, notably in New York and New Jersey.<sup>20</sup> Generally, in the United States, the rights and duties of such guardians are fulfilled by the ordinarily appointed, or judicial, guardians.

<sup>13</sup> Macph. Inf. 103, cited in Schoul. Dom. Rel. (5th Ed.), Sec. 288.

<sup>14</sup> Bouv. Law Dict., citing Brett L. Cas. Mod. Eq. 95; 1 Black. Comm. (Sharsw. Ed.), p. 462, note 8.

<sup>15</sup> 1 Johns. Ch. (N. Y.) 99 (1814).

<sup>16</sup> 2 Kent's Comm. 226; 30 Miss. 458 (1805).

<sup>17</sup> Cent. Dict.

<sup>18</sup> Co. Litt. 87, 89, and note.

<sup>19</sup> 138 N. Y. 333 (1893).

<sup>20</sup> 5 Johns. (N. Y.) 66 (1809); 105 N. Y. 560 (1887).

**9. Guardian ad Litem.**—Minors are frequently interested in lawsuits or cases in the courts. As a minor, by itself, cannot prosecute or defend, it becomes necessary to have a person appointed to act for it and look after its interests in litigation. These persons are differently designated, according to the position of the minor in the suit. A **guardian ad litem** is a person appointed by the court to manage the defense of a minor in a lawsuit, or to protect its interests whenever they are concerned, though the suit be brought by a third person. Such guardian is regularly appointed by the court on motion; but it is frequently done without motion, the court instructing the court clerk to enter on the docket the name of some person to officiate in that capacity. And when a suit is instituted directly in behalf of a minor, it must be brought by or through its next friend, designated technically by the old French law term *prochein ami*.

## APPOINTMENT OF GUARDIANS

**10. How Appointed.**—All guardians of infants specially appointed must be appointed by the infant's parent, by the infant itself, or by a court of competent jurisdiction.<sup>21</sup> At common law, and generally by statute, a minor after it reaches the age of fourteen may make its own choice of a guardian.<sup>22</sup> Its choice, however, is subject to rejection by the court for good reasons, and in case of rejection it may choose again.<sup>23</sup> If the court appoint a guardian for a minor under the age of fourteen, when the ward reaches that age it may appear and make its own choice of a guardian, and the court will assent to the ward's selection without any notice to the guardian previously appointed.<sup>24</sup> If, at the age of choice, the ward do not choose another guardian, the old appointee may officiate; but in some states, the old guardian can only be removed for cause, in which case he is entitled to notice.<sup>25</sup>

**11. Who May Be Appointed.**—In the selection of a guardian for a minor, the parents are the first in the matter of preference, or right to guardianship.<sup>26</sup> As before stated, a parent is the only natural guardian possible, and, except where the father is unfit, the natural order of appointment as to a guardian by nature will not be varied. The father being dead, or incompetent or unfit to act, the mother becomes the natural guardian. In some states,<sup>27</sup> the statutes give the father and the mother equal rights as to guardianship. It is the universal law that while children are of tender age the mother is the preferred natural guardian as to their persons, and some states have admitted this right by statute.

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<sup>21</sup> Bouv. Law Dict.; Schoul. Dom. Rel. (5th Ed.), Sec. 297.

<sup>22</sup> Reeve Dom. Rel. 320.

<sup>23</sup> 14 Ga. 594 (1854).

<sup>24</sup> 30 Miss. 458 (1855).

<sup>25</sup> 8 Ind. 307 (1856); 96 Pa. 243 (1880).

<sup>26</sup> 2 Dem. (N. Y.) 4 (1883).

<sup>27</sup> Stats. Iowa, Kans., and Neb.



In case of the inability of both parents to act, or where the minor has no parents, the court will appoint another to act as guardian, preferring, in some instances, relatives or next of kin.<sup>28</sup> In some jurisdictions, a grandparent<sup>29</sup> leads in the right to appointment, and a parental grandparent or his nominee has been given preference over a maternal grandparent, though, as a general rule, there is no preference as between parental and maternal relatives; and this is so though the ward's property come from the paternal side.<sup>30</sup> The court, however, is not bound to appoint a relative.<sup>31</sup> With due regard to the welfare of the minor and the benefit of its estate, the court will use its discretionary power in selecting a guardian conforming to whatever principles of preference or right exist, and will appoint a relative in preference to a stranger, other things being equal.<sup>32</sup> No one has a right to demand an appointment of himself as guardian, except persons designated by statute.<sup>33</sup>

A guardian is selected because of his fitness in point of integrity, good judgment, prudence, and general good character, since to him is to be entrusted the welfare of his ward, and the ward's estate; besides these, the qualification of disinterestedness should exist, as no one whose interest might conflict with the ward's should be appointed. By statutes in some states, trust companies and similar institutions may act as guardians. As to the estates of wards, these institutions are frequently preferred to relatives and other persons, whose fitness is not disputed, the court, in its appointment, having in mind the welfare of the ward.

**12. Persons Disqualified.**—In some states, persons disqualified to act as guardians are those who do not reside in the domicile<sup>34</sup> of the prospective ward—non-residents—the appointment of whom is regarded as improper from motives regarding the welfare of the ward, since a guardian should, for obvious reasons, notably the close attention he owes to his

<sup>28</sup> 114 U. S. 218 (1884).

<sup>29</sup> 2 Pa. Dist. Rep. 584 (1893).

<sup>30</sup> 19 N. J. Eq. 433 (1868).

<sup>31</sup> 1 Redf. (N. Y.) 333 (1860).

<sup>32</sup> 44 Ga. 485 (1871).

<sup>33</sup> 63 Mich. 319 (1886).

<sup>34</sup> 35 Ohio St. 550 (1880).

trust, be a resident of the ward's place of domicile. By statute, in some states,<sup>35</sup> an executor or administrator is ineligible to act as guardian of a minor having an interest in an estate under the care of such executor or administrator. This statutory provision does not extend to testamentary guardians.

The appointment of a married woman as guardian is now authorized by the modern legislation enlarging their status,<sup>36</sup> though formerly the appointment of a married woman was improper. Even if appointed guardian of her own child, a married woman's trust ceased at remarriage.<sup>37</sup> In England, it has been held that the appointment of a married woman to be sole guardian is improper;<sup>38</sup> and, in some of the United States, the courts have required the husband's consent to his wife's appointment, and it must appear that he, as well as she, is a suitable person.<sup>39</sup>

In the United States, in the appointment of guardians, religious discriminations have never been made, the only purpose of the courts being to carry out the wishes of the parents in this respect. In England, the rule is to appoint a guardian of the religious faith in which the father died and in which he wished his child to be brought up.<sup>40</sup>

**13. Foreign Guardians.**—The courts of some states recognize foreign guardians. One appointed a guardian in Pennsylvania, for instance, is a foreign guardian in Minnesota and subject to the laws of the latter state as to any exercise of power by virtue of the relation of guardian and ward, but he will be recognized there and can act as to matters which may require the acts and duties of a guardian.<sup>41</sup> In some states, it is held that, before a guardian can sue in states which are foreign to him in his capacity as guardian, he is required to file in court a copy of the letters of appointment obtained in his own state and give bond to account to the state of his appointment for all moneys he may receive in the foreign

<sup>35</sup> 34 Me. 41 (1852).

<sup>36</sup> 63 Mich. 319 (1886).

<sup>37</sup> 2 Redf. (N. Y.) 69 (1872).

<sup>38</sup> L. R. 1 Ch. (Eng.) 387 (1866).

<sup>39</sup> 19 Ind. 88 (1862).

<sup>40</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 15, p. 40, citing 1 Bradf. (N. Y.) 143 (1850); 19 N. J. Eq. 433 (1868); (1893) 1 Ch. (Eng.) 143.

<sup>41</sup> 4 Minn. 412 (1860).

state.<sup>42</sup> In other states, a foreign guardian must obtain ancillary letters of guardianship before he can act.<sup>43</sup>

**14. Guardians for Distinct Purposes.**—As previously stated, the law of guardianship is naturally divided into guardianship of the person and guardianship of the estate.<sup>44</sup> In some states,<sup>45</sup> by statutes, the court may appoint separate guardians of the person and the property of a minor; but in other states, such a separation is deemed inadvisable, and the court will not grant an application to appoint one person guardian of the person alone, and another person guardian of the minor's estate. The great evil in two guardianships lies in two sets of accountings and expenses for the accomplishment of that which should be one duty.<sup>46</sup> On the other hand, it is claimed in support of separate guardianships that a person may be eminently qualified and competent to have the care and custody of a minor, and yet neither qualified nor competent to manage his or her property, and vice versa. The policy of the law is to place the interests of minors in the care of the courts, and the courts are necessarily vested with a large discretion in the appointment of guardians, and in directing as to the management and control of both the person and property of the ward.<sup>47</sup> The general rules of guardianship apply equally to adopted children. In the appointment of a guardian for an illegitimate child, the mother is preferred, and, upon her death or unfitness, the putative father may be appointed.

**15. Method of Appointment.**—In the United States, the practice in the appointment of guardians is by petition presented to the proper court. The residence of a minor, rather than the location of his property, determines what court has jurisdiction to make the appointment.<sup>48</sup> If the infant have no residence in the state, the court of the county in which his property is located is generally authorized to make the appointment.<sup>49</sup>

<sup>42</sup> 30 Ala. 613 (1857); 25 Ga. 58 (1858).

<sup>43</sup> 17 B. Monr. (Ky.) 163 (1856).

<sup>44</sup> See *sub*title The Relation *supra*.

<sup>45</sup> 84 Iowa 362 (1892).

<sup>46</sup> 53 N. J. Eq. 344, 346 (1895).

<sup>47</sup> 84 Iowa 362 (1892).

<sup>48</sup> 6 J. J. Marsh. (Ky.) 198 (1831).

<sup>49</sup> 4 Allen (Mass.) 466 (1862).

In the matter of form the petition varies in different jurisdictions. Usually there is set forth the necessity for the appointment, the name, age, residence, and estate of the minor; also the names of the minor's parents, if living, and, in some states, the fact that the person proposed as guardian has consented to act. One guardian may be appointed for several minors where their interests do not conflict, especially when they have an estate in common.

In some states, when the appointment of a guardian is to be requested by petition to the court, all parties in interest must be notified, default of such notice being fatal to the legality of the proceeding and voidable, unless a legal excuse for not giving notice be stated in the petition; but assent or attendance in such proceedings dispenses with a formal notice so far as those interested are concerned.<sup>50</sup>

Parties interested may be cited by the court to appear on a certain court day, upon which day, after a summary hearing, the judge of the court appoints the guardian and directs that letters of guardianship be issued to the appointee upon his filing the necessary bond. Any one feeling aggrieved by the action of the court in making the appointment may appeal to a higher court, which tribunal hears and makes full and final decree, to which the lower court conforms and issues letters of guardianship accordingly.<sup>51</sup>

In England, the practice in the court of chancery is to appoint guardians on petition presented, but the matter is first referred to a master to approve of a proper person for the guardianship. "For this purpose," says an authority, "the master is attended by all proper parties, and, after full hearing, he makes his report, in which he mentions the infant's age and fortune, the evidence and the legal grounds on which his approval of the guardian is based, and the maintenance proper for the child. The vice-chancellor confirms or varies the report at his discretion, and then makes the appointment. From his decision appeal lies to the full court."<sup>52</sup>

<sup>50</sup> 83 Cal. 344 (1890).

<sup>51</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 307.

<sup>52</sup> *Ibid.*, citing Macph. Inf. 106, 107, and cases cited; 2 Kent's Comm. 227.

## THE GUARDIAN'S BOND

**16. When Security Is Required.**—In most jurisdictions, the judicial appointment of a guardian is completed by the giving of a probate bond. This is a condition precedent to the existence of the guardian's authority, and acts done without such qualification are void. But in some jurisdictions the giving of a bond is not essential to complete the guardian's appointment, and his acts are valid though no bond be given. Under the statutory privilege extended to certain corporations, such as trust companies and the like, to hold probate trusts, the capital of the corporation is regarded as sufficient security, and the execution of a special bond is not required.<sup>53</sup> Where there are several wards, one probate bond is sufficient for all, though separate bonds for each ward would not be improper, and in some instances might be even preferable. When only one bond is furnished, the names of all the wards should be included in the bond.<sup>54</sup> A bond is not generally required of a natural guardian.<sup>55</sup>

In England, and most of the United States, testamentary guardians are not required to give security. But, in some of the United States, in the event that the testator's appointment of a testamentary guardian is made subject to judicial approval, a bond is required of such guardian, except in cases where his appointment by the testator is coupled with a request by the testator that he shall act without giving bond, and the court deems it safe to respect such request.<sup>56</sup> In England, chancery guardians are required to give security in a bond conditioned that they shall render account of their trust when ordered so to do.<sup>57</sup> When reference is made to a

<sup>53</sup> *Am. & Eng. Encyc. Law* (2d Ed.), Vol. 15, p. 43, citing 57 Fed. Rep. 966 (1893); 68 Fed. Rep. 43 (1895); 2 Doug. (Mich.) 433 (1847); 56 Kans. 213 (1895); 4 Redf. (N. Y.) 66 (1879).

<sup>54</sup> *Schoul. Dom. Rel.* (5th Ed.), Sec. 366.

<sup>55</sup> 9 Fla. 289 (1866).

<sup>56</sup> *Schoul. Dom. Rel.* (5th Ed.), Sec. 366, citing Mass. Gen. Stats.; 13 Phila. 213 (1879); 57 Fed. Rep. 966 (1893).



master, as before explained, on the original petition for guardianship, he is directed to make report approving the security offered. A recognizance with sureties is usually taken, but the court uses its discretion and sometimes the personal recognizance of the guardian is deemed sufficient.<sup>58</sup>

**17. Amount and Conditions.**—In most jurisdictions, the amount of a guardian's bond is regulated by statute. Usually it is double the value of the personal property of the ward to be accounted for.<sup>59</sup> Where, however, the estate is very large, the requirement of a double penal sum in the bond is relaxed or limited, in the court's discretion.<sup>60</sup> The sureties in the bond must be approved by the court.

All the obligors are liable for property of whatever nature that comes into the guardian's possession or knowledge, and for the profits thereof during his term of office.<sup>61</sup> The liability of sureties is coextensive with the guardian's responsibility, and it may go beyond the time when the guardian's authority ceased. Many of the same principles that apply to other bonds govern the bonds of guardians, and where the principal in a bond (the guardian) has ceased to be responsible by his own, or his ward's, death, or is removed, or by some happening is released, the sureties may still be followed for the penalty of the bond.

The conditions of the bond generally require the guardian to make a true inventory of the ward's estate, to manage the property according to law and the best interests of the ward, to render stated accounts, and to settle with the ward at the expiration of the trust. It also stipulates for a suitable discharge of duties as to custody, education, and maintenance of the infant.<sup>62</sup>

<sup>57</sup> 2 Kent's Comm. 227.

<sup>58</sup> Schoul. Pers. Prop., Sec. 365.

<sup>59</sup> 2 Barb. Ch. (N. Y.) 216 (1847).

<sup>60</sup> 1 Edw. Ch. (N. Y.) 57 (1831).

<sup>61</sup> 13 Gray (Mass.) 387 (1859).

<sup>62</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 366.

## DUTIES OF GUARDIANS

**18. General Obligations.**—The relation of guardianship imposes on the guardian the duties incident to a trustee in equity and bailee in law. It is a trust which he cannot assign.<sup>63</sup> He is bound to manage the estate himself, and has no right to divest himself of its supervision and control.<sup>64</sup> He sustains in the fullest sense a trust relation to his ward. In all dealings with the ward's property he is bound to look only to the ward's interest. He will not be permitted, therefore, to occupy a hostile position to that of the ward, nor to pursue personal interests antagonistic to those of the ward;<sup>65</sup> nor will he be permitted to reap any benefit, except his legal compensation, from his ward's estate, but will be held to account for any profit resulting from the management of the estate.<sup>66</sup>

**19. Care and Custody of the Ward.**—One appointed the general guardian of a minor child, that is, guardian of both its person and estate, has the care and custody of his ward's person and the management of his ward's estate,<sup>67</sup> and he is responsible for the proper and legal performance of the duties which pertain thereto.<sup>68</sup> Upon him devolve, to a great extent, the duties of a parent as to protection, education, and maintenance;<sup>69</sup> but where the ward has a parent competent to support him, the guardian is not permitted to indulge in any expense for the education and maintenance of the ward out of the ward's estate, because the parent's duty in that respect is still obligatory on him whether he be guardian or not, or whether his child be the ward of another.<sup>70</sup>

<sup>63</sup> Bouv. Law Dict., citing 2 Md. 111 (1852); 1 Pars. Cont. 16.

<sup>64</sup> 67 Ala. 406 (1880); 52 Hun (N. Y.) 119 (1889).

<sup>65</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 15, p. 75, and cases there cited.

<sup>66</sup> 17 Ala. N. S. 306 (1850); 33 Conn. 351 (1866).

<sup>67</sup> 4 Iowa 361 (1856).

<sup>68</sup> 2 Pa. Dist. Rep. 772 (1893).

<sup>69</sup> 112 Ind. 183 (1887).

<sup>70</sup> 43 Me. 279 (1860).

In the care of a ward whose estate is productive of interest sufficient to maintain and educate it, or support it in idleness, the guardian will not be upheld by the court in permitting his ward to live in idleness and eat up the estate. The guardian's duty in such case is to expend the estate in the ward's maintenance and education, if there be no parent to do so; and, if the ward be not tractable to study, and is able to work, it is the guardian's duty to have it work and maintain itself; or, if the ward's estate be not sufficient to maintain and educate it, and it be able to work, it should be employed and its earnings devoted to its maintenance, to the saving and benefit of its small estate.

A father who is also guardian of his own child cannot use the income of the child's property to support the child, unless the father's means be small, when he will be allowed assistance from the child's estate to bring it up in becoming style. And where the father, when acting as guardian for his own child, might have reimbursed himself, any other person, as guardian, may help him.<sup>71</sup>

The legal right of a guardian to the custody and control of the ward is superior to that of any other person. Even though the wards be young children, who are unwilling to be parted from other custodians, the guardian's right to custody will prevail.<sup>72</sup> This legal right of the guardian is, however, subordinate to the ward's welfare, and will be disregarded by the court whenever necessary in the ward's interest.<sup>73</sup>

**20. Right to Change the Ward's Domicil.**—While the domicil of the guardian is usually regarded the ward's domicil, the right of a guardian, other than a natural guardian, to change his ward's domicil from one country or state to another is generally denied.<sup>74</sup> "The great objection," says an authority, "to a change of the infant's domicil is that the right of succession to personal property may be thereby affected; and it seems probable that, if the change be made with fraudulent intent, to the ward's injury or the

<sup>71</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 339.

<sup>72</sup> 5 Ad. & Ell. (Eng.) 441 (1836); 2 Ind. 613 (1851); 4 Myl. & C. (Eng.) 673 (1840).

<sup>73</sup> 166 Pa. 249 (1895).

<sup>74</sup> 112 U. S. 452 (1884); 2 W. & S. (Pa.) 568 (1841); 14 Phila. 298 (1881).

custodian's private advantage, it will not be sustained.'"<sup>75</sup> But it seems that a testamentary guardian so far represents the father that he may make such a change, though the court will restrain a removal in derogation of the rights of the surviving mother. Therefore, a testamentary guardian will not be allowed to take the child to another state against the mother's wish, though the father's will contemplated such a removal.<sup>76</sup>

The restriction of the guardian's right to change the ward's domicil extends only to a change from one country or state to another and is largely dependent on the court's discretion. It is claimed, by the decisions of the courts, in some states, that the guardian has power to remove his ward from one town, county, or parish to another within the same state;<sup>77</sup> and it is held, in one case, that the domicil may be in one state, and the residence for the purpose of guardianship of the person in another state.<sup>78</sup>

**21. Duties as to the Ward's Estate.**—The principal duty of a guardian, being that for which, in most cases, he has been appointed, is the care and management of the ward's estate.<sup>79</sup> In this regard he has to the ward's estate the same relation as an executor or administrator has to the whole of the decedent's estate,<sup>80</sup> to wit: To gather together the assets and the property of the estate, to collect all rents and dues, pay necessary expenses, deposit the funds in his official capacity and invest the same judiciously; to do, in fact, all that is required by judicious and careful management of his ward's estate for the welfare of the ward.<sup>81</sup> First of all, of his statutory duties, a guardian must file an inventory of his ward's personal estate, which is similar in the method of preparation and effect to that required to be made and filed by an executor or administrator. It serves as a guardian's guide in the conduct of the ward's estate, being especially valuable as the foundation of his accounts, and is the first step in fixing his liability.

<sup>75</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 334.

<sup>76</sup> 5 Paige (N. Y.) 596 (1836).

<sup>77</sup> 14 La. Ann. 565 (1859); 4 Bradf. (N. Y.) 221 (1857).

<sup>78</sup> 97 Pa. 74 (1881).

<sup>79</sup> 152 U. S. 499 (1893).

<sup>80</sup> 62 Ala. 110 (1878).

<sup>81</sup> 33 N. Y. 289 (1865).

**22. Powers in Real-Estate Matters.**—Conversion of the ward's property from personal to real, or from real to personal, when advantageous, will be permitted by the court in some jurisdictions,<sup>82</sup> though courts will act, in such cases, with hesitancy, being averse to such changes of a minor's estate.<sup>83</sup>

The sale of a ward's real estate,<sup>84</sup> and putting a mortgage on it,<sup>85</sup> are other acts which are permitted with caution by the court. When either act is necessary, it must be done as provided by statute.<sup>86</sup> In some jurisdictions, sales of the lands of a ward, or mortgaging such lands, are frequent, depending entirely upon the necessity as it appears when the guardian petitions the court for authority to do either act. Usually an additional, or special, bond will be exacted from a guardian who secures an order of sale or to mortgage from the court, if a new fund, not covered by the first bond, is to come into his hands.<sup>87</sup> The proceedings, where permission to sell real estate by a guardian is applied for, are similar to those described with respect to executors and administrators.

## ACCOUNTING

**23. General Remarks.**—A guardian's bounden duty, stipulated as part of the condition in the bond, is that he shall render a just and true account of his management of the estate and shall also deliver up the property agreeably to the order and decree of the court and direction of the law.<sup>88</sup> The same strict declarations of the law which are made regarding the bonds of executors and administrators apply to guardians and the explanations given of accounting as to such officials, with some additional information, will serve to convey an understanding of the accounts required from appointed guardians.

Guardians have much accounting to do, by reason of the protracted existence of the relation. Ordinarily, a guardian

<sup>82</sup> 79 Ill. 66 (1875).

<sup>83</sup> 136 U. S. 519 (1889).

<sup>84</sup> 64 Ala. 410 (1879).

<sup>85</sup> 71 Ala. 240 (1881).

<sup>86</sup> 3 App. Cas. (D. C.) 149 (1894).

<sup>87</sup> 1 Metc. (Ky.) 260, 418 (1858).

<sup>88</sup> 15 La. Ann. 121 (1860); 34 Pa. 272 (1859).



takes his trusteeship when his ward is very young and holds it until the ward's majority is reached. As to an executor or administrator the situation is reversed in most cases, since such an official takes hold of a deceased person's estate, and it is customary to wind up the business with promptness and despatch, legatees and devisees being entitled to get their distributive shares as soon as possible. While a guardian is held to as strict accountability as other trustees, he has a longer contract on his hands, and he accounts oftener and for a longer period of time.

The intermediate accounts of a guardian may be from year to year, every three years, or oftener or less frequent, just as the statutes or local customs of different jurisdictions may require, or as the court may direct.<sup>89</sup> His final account is made at the end of his trust and that is generally the true story of his stewardship. An opportunity is not offered, until final account is filed, for the ward to ascertain just where it stands financially.<sup>90</sup> As to the final accounts of other trustees, so with the last balance sheet of a guardian; much that is put down erroneously in former accounts is allowed to be corrected, and after-discovered assets, not in the inventory, are put into the final account, if they were not charged in one of the intermediate accounts.

It is required that an account shall be itemized with particularity as to dates and facts,<sup>91</sup> mentioning proper vouchers for every sum paid out,<sup>92</sup> which vouchers belong to the guardian. Where one person is guardian for several wards, having different property interests, separate accounts as to each ward should be prepared and filed.

**24. Investment of Funds.**—The same rules as to the investment of the funds of an estate by an executor or administrator apply with equal force to guardians. It is a reasonable proposition that it is for the guardian's own interest that he invest the trust funds which come into his hands, and it follows that he is a judicious guardian who faithfully

<sup>89</sup> 37 Barb. (N. Y.) 168 (1862).

<sup>90</sup> 82 Pa. 169 (1876).

<sup>91</sup> 8 Ala. 796 (1845).

<sup>92</sup> 79 Ga. 274 (1887); 14 Phila. 265 (1881)

accounts for the increase of those funds by investment.<sup>93</sup> A guardian is legally bound to make his ward's funds productive. In addition to having the funds which come to him well secured, he should procure a change of securities whenever necessary for safety and betterment, and invest surplus funds so that they may be the most productive.<sup>94</sup> A guardian can avoid personal liability in investing his ward's money by obtaining leave of the court to make the investment.<sup>95</sup>

**25. Expenses in Litigation.**—A guardian may take credit in his account for the expenses incurred in litigation, including counsel fees, where he has acted prudently in instituting or defending actions in which the ward's interests were to be served.<sup>96</sup> He may also take credit for the services of an accountant necessarily employed to assist in stating an account.<sup>97</sup>

**26. Compensation.**—The compensation of a guardian for his services is the subject of statutory regulation in some of the United States, the guardian being entitled to credit himself with a fixed commission.<sup>98</sup> In the absence of statutory allowance, the guardian's compensation is left to the discretion of the court, and fixed adequately according to the services rendered and the condition of the estate;<sup>99</sup> or the court may disallow the guardian any compensation for breach of official duty.<sup>100</sup> Compensation is proportioned to the responsibility incurred, and to the labor and care bestowed.<sup>101</sup> A guardian, unlike an administrator, is a trustee for custody and management, not for mere collection and distribution. The percentage on the sum collected, allowable to an administrator or executor, is not, therefore, always a just measure of what should be allowed to a guardian.<sup>102</sup>

In England, a like rule prevails as to the compensation of guardians that governs that subject respecting executors and

<sup>93</sup> 41 Ala. 234 (1867).

<sup>94</sup> 90 Ky. 355 (1890).

<sup>95</sup> 118 Cal. 73 (1897).

<sup>96</sup> 7 T. B. Monr. (Ky.) 150 (1828).

<sup>97</sup> 131 Ill. 182 (1889).

<sup>98</sup> 50 Ala. 297 (1874); 2 Paige (N. Y.) 287 (1830).

<sup>99</sup> 109 Mass. 252 (1872).

<sup>100</sup> 55 Ind. 381 (1876); 175 Pa. 411 (1896).

<sup>101</sup> 33 Ill. 212 (1864).

<sup>102</sup> 46 Pa. 347 (1863).

administrators, namely, that the services of such trustees are gratuitously rendered. Guardians are allowed by chancery necessary expenses actually incurred, but no compensation for the labor performed in managing the ward's estate.<sup>103</sup>

**27. Compulsion to Account.**—A guardian may be compelled to account by any person having an interest in the estate of the ward. There may be, collaterally, interests which give a party, who asks the court to order an accounting by a guardian, the right to do so, and this may occur, too, long after the trusteeship has ceased.<sup>104</sup> Guardians of wards who have limited estates must obey the law's mandate as to filing accounts as fully as those who have affluent wards; but where naught comes into a guardian's care, he has naught to account for, not even to put into an inventory.

**28. Verification and Confirmation.**—The accounts of guardians are required to be verified on oath; that is the safeguard to insure a strict accounting. Where there are joint guardians, it is sufficient if an account be verified by the oath of one of them. The confirmation by the court of the final account of a guardian, and the granting of his petition for a discharge, is the end of a guardian's labors and liability, and the relation of guardian and ward is dissolved.<sup>105</sup>

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<sup>103</sup> Schoul. Dom. Rel. (5th Ed.), Sec. 375.

<sup>104</sup> 15 La. Ann. 121 (1860).

<sup>105</sup> 128 Ind. 103 (1890); 78 Pa. 66 (1875).

## TUTORSHIP IN LOUISIANA

**29.** In Louisiana, the system of guardianship is derived from the civil law, and is called **tutorship**. The natural tutorship of the parents of a minor is recognized, also the right of parents to appoint a testamentary tutor. The authority of a natural tutor extends to the property as well as to the person of the ward.<sup>106</sup>

Where a minor is an orphan and no tutor by will has been appointed, the judge appoints the next of kin to be tutor. In case the orphan has no relatives who may claim the tutorship by the effect of the law, or, when the tutor appointed is liable to be excluded, or is legally excused, "the judge shall appoint a tutor to the minor, by and with the advice of the family meeting."<sup>107</sup> A **family meeting**, as provided by statute, is required to be composed of at least five relatives; and, in default of relatives, friends of him in whose interest they are called upon to deliberate must be selected from those living in the same parish, or, in a neighboring parish, provided they do not reside at a distance exceeding thirty miles.

In every tutorship there is required to be an **under tutor**, whom the judge appoints at the time the letters of tutorship are certified for the tutor. His duty is to act for the minor whenever the latter's interests are in opposition to that of the tutor; or, if the tutor should neglect to render his annual account as required by law, the under tutor must give notice to the judge having jurisdiction that the tutor has failed to account, whereupon the judge shall order the tutor to render his account.<sup>108</sup>

<sup>106</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 15, p. 44, citing 47 La. Ann. 882 (1895).

<sup>107</sup> La. Rev. Civ. Code 1900, Art. 270.

<sup>108</sup> *Ibid.*, Arts. 273-281.

# THE LAW OF NOTARIES PUBLIC

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## DEFINITIONS AND HISTORY

1. A **notary public**, or **notary**, is an officer duly commissioned and holding a seal of office, who is empowered by law to note protests and certify the same, administer oaths, take depositions, and acknowledgment of deeds and other instruments, and to authenticate the same by his official certificate, signature, and seal.<sup>1</sup> In the earlier history of writing, the vocation of a notary was to make notes and memoranda of the acts of others who wished to preserve evidence of them, and to reduce to writing deeds and contracts.<sup>2</sup>

A **notarial act** is the act of authenticating or certifying some document or circumstance by a written instrument under the signature and official seal of a notary, or of authenticating or certifying as a notary some fact or circumstance by a written instrument, under his signature only.<sup>3</sup>

Notaries public are officials of great antiquity, being older than the law merchant. They originated under the early Roman jurisprudence and were known as *tabelliones forenses*, or *personæ publicæ* (public persons). The term *tabellio* is derived from the Latin *tabula*, seu *tabella*, which, in this sense, signified those tables or plates covered with wax, used formerly instead of paper.<sup>4</sup> *Tabelliones* differed from notaries in many respects. They had judicial jurisdiction in some cases, and from their judgments there were no appeals. Notaries were then the clerks or aiders of the *tabelliones*; they received the agreements of the parties, which they reduced

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<sup>1</sup> Stand. Dict.; 6 S. & R. (Pa.) 486 (1821).

<sup>3</sup> *Ibid.*

<sup>2</sup> Cent. Dict.

<sup>4</sup> Bouv. Law Dict., citing 8 Toull. n. 53



to short notes; and these contracts were not binding until they were written in full, which was done by the *tabelliones*.<sup>5</sup>

In England, the office of notary existed before the conquest, and is frequently referred to in history. The general nature of the office has come down from that time, changed only as the character of the age has made it requisite.<sup>6</sup> Notaries also exist in all the countries of Europe, and as early as A. D. 803 were appointed by the Frankish kings and popes.<sup>7</sup>

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## APPOINTMENT AND ELIGIBILITY

**2.** The manner of the appointment of notaries varies in different jurisdictions. In England, they are appointed by the court of faculties of the Archbishop of Canterbury, the office having arisen under the civil and ecclesiastical law. In France, they are appointed by the government, although the power of appointment was formerly claimed by the pope. In the United States, they are appointed in the several states by the governor, either alone, or, in some states, by and with the advice of the senate, and, in other states, by and with the advice of the governor's council. In the District of Columbia, they are appointed by the president of the United States. In some states, certain public officers are constituted notaries *ex officio*. These are clerks of the courts, justices of the peace, mayors, and recorders.

**3. General Requirements.**—In the United States, it is required of the applicant for a notary's commission that he be a citizen of the state in which he intends to serve, and a person of good moral character. In some states, a certain length of residence is required before a person can qualify as a notary.<sup>8</sup> In some jurisdictions, there is no requirement that, to be eligible, a person must be of the age of twenty-one years, although the appointing official will hesitate to commission any one not a qualified elector.

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<sup>5</sup> Jac. Law Dict.

<sup>6</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 16, p. 753, citing Prof. Not., Sec. 6.

<sup>7</sup> Bouv. Law Dict.

<sup>8</sup> Prof. Not., Sec. 13.

Women, married or single, are, as a rule, eligible, but the constitutions of some states prohibit the election or appointment, to any civil office, of any person except a qualified elector, and it is so held by judicial authority.<sup>9</sup> In some states, judicial decisions hold, and, in others, it is declared by statute, that women are eligible to the office, the performance of the duties being regarded as ministerial and not judicial.<sup>10</sup> In Alabama, Missouri, and Pennsylvania, there are such statutory enactments. In Missouri, females must be eighteen, and males twenty-one, years of age.<sup>11</sup> In Pennsylvania, the qualifications of women for the office are that they must be twenty-one years of age and citizens of the commonwealth; it is further provided that whenever any female notary shall marry she shall, before the performance of any notarial act, return her commission to the governor, stating the fact of such marriage and giving her married name, and the governor shall thereupon issue to her a new commission, conforming to the change of name and covering the term for which she was commissioned, and without the payment of any additional fee, but requiring the giving of a new bond.<sup>12</sup> In Texas, women are appointed to act as notaries without the authority of statute.

**4. The Notary's Bond.**—In all states, except Connecticut, New Hampshire, New Jersey, New York, North Carolina, South Carolina, Vermont, and West Virginia, notaries are required to execute an official bond varying in amount from five hundred to five thousand dollars, conditioned for the faithful performance of their duties, which bond must be approved by proper authority and may be sued upon by any person injured by the failure, neglect, or inability of the notary to discharge his duties, in like manner as suits upon other official bonds. *Ex officio* notaries, except in the states above mentioned, are required to execute notarial bonds in addition to their official bonds.<sup>13</sup>

A notary must give bond before his commission will be

<sup>9</sup> Const. Colo.; 150 Mass. 586 (1890).

<sup>10</sup> 1 Hugh. (U. S.) 37 (1876); Chit. Prer., Sec. 84.

<sup>11</sup> Not. Man., Sec. 4.

<sup>12</sup> Pa. P. L., 1893, p. 16, Secs. 1, 2.

<sup>13</sup> Not. Man., Sec. 3.

issued. But, if he be duly appointed, a failure to file such a bond as is required by law will not make his acts as notary invalid. As in case of other public officers, he is still a notary *de facto*, that is, one who performs the duties of the office with apparent right and under claim and color of an appointment, but without being actually qualified to do so, and his acts are valid as to third parties, and cannot be attacked collaterally, that is, in any proceeding except one instituted for the express purpose of having them declared void.<sup>14</sup> The same rule applies if for any other reason a notary, though duly appointed, have no rightful title to his office, as, for example, if he be not a citizen of the state, or have not resided therein the required length of time.

**5. Oath of Office.**—In addition to giving a bond, a notary is required to qualify by taking a prescribed oath of office. Usually a duplicate of the oath is required to be filed with the secretary of the state.

**6. Term of Office.**—In the United States, a notary's term of office is fixed by the statutes of the particular states, the length of time for which they are appointed varying. In some states, the term expires at the end of two years; in other states, the duration of the commission is four years.<sup>15</sup> In a few states, the term is during life or good behavior. In some states, it expires absolutely on the completion of the

<sup>14</sup> 14 Iowa 464 (1863).

<sup>15</sup> Pa. P. L., 1901, p. 70, Sec. 2; 58 Am. Rep. 438 (1885). In Alabama, there are two classes of notaries, each of which is appointed by the governor. The duties of the first class include the administration of oaths, taking acknowledgments of certain instruments of writing, the protesting of bills of exchange, and other like powers, such as are expressly prescribed by statute, or authorized by general commercial usage. These are notaries public in the common acceptation. The second class, in addition to these powers, possess all the jurisdiction of justices of the peace, civil and criminal, and are therefore judicial officers. The governor is authorized by the constitution to appoint one notary of this class for each election precinct in the several counties of the state, and one for each ward in cities of over five thousand inhabitants, who are *ex officio* justices of the peace within their respective wards or precincts. While the statute expressly declares that the first class shall "hold office for three years from the date of their commissions, and until their successors are qualified," it is equally clear in the declaration that the second class shall hold their office three years from the date of their commissions, thus by obvious implication excluding a construction which would permit them to hold for a single day after the expiration of their commissions. Code, Sec. 1,325; Const. (1875), Art. IV, Sec. 26; 76 Ala. 78 (1884).

term, while in others, it endures until a successor is appointed and qualified.

The power of a notary to act as such after the expiration of his term of office, and the validity of acts done by him, depend on the peculiar laws of each state. As a general rule, the office determines absolutely when the term expires, and acts thereafter done in good faith are those of an officer *de facto* and cannot be collaterally assailed, although a new appointment cannot be presumed from the mere fact of his acting as notary.<sup>16</sup> But his acts will be held valid, if he have continued to exercise the duties of his office, by public acquiescence, for such length of time and by such frequency of repetition as to afford reasonable presumption of his holding over under a reappointment.<sup>17</sup> However, it is held that when all public officers hold over until their successors are elected or appointed, the office of a notary does not cease on the expiration of the term for which he was appointed, but continues until a successor is appointed, or he is removed.<sup>18</sup> The statutes in some states provide that the acts of a notary after his commission expires shall be valid;<sup>19</sup> but in Pennsylvania, by a recent enactment, the date of the expiration of the commission must be attested to all notarial acts,<sup>20</sup> thus indicating an intention to maintain the general rule that the office determines absolutely when the term expires.

A notary public is not required to deliver his records or papers to any one as his successor,<sup>21</sup> unless it be so provided by statute, though it is frequently done as a matter of usage. In point of fact, a notary has no successor, in the strict sense of that term, unless there be a statutory provision to that effect; and one appointed to succeed another usually does not fill his unexpired term, but holds for the usual term from the date of his appointment.<sup>22</sup>

**7. The Notarial Seal.**—At common law, a notary was required to have an official seal. In most jurisdictions, by

<sup>16</sup> 37 Ohio St. 73 (1881); 2 Kent's Comm., Sec. 295; 22 Wall. (U. S.) 99 (1875).

<sup>17</sup> 76 Ala. 78 (1884).

<sup>18</sup> 74 Ga. 416 (1885).

<sup>19</sup> 37 Ohio St. 73 (1881).

<sup>20</sup> Pa. P. L., 1901, p. 91, Sec. 5.

<sup>21</sup> 14 Iowa 464 (1863).

<sup>22</sup> 5 La. Ann. 282, 534 (1850).

statute, a notary is required to have a seal of office, which, as a general rule, he must affix to all his notarial acts, especially such as are done under the law merchant; for the seal is evidence of the official character of the act, which often cannot be otherwise supplied. Courts universally will take judicial notice of a notary's seal as authenticating acts done under the law merchant. Statutes in most of the United States prescribe the form of the notarial seal. In the absence of statute anything which will fulfil the requirement of a common-law seal is sufficient.<sup>23</sup>

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## JURISDICTION

8. Though a notary is not a public officer in the same degree as a justice of the peace, register of wills, or the like, since he holds no courts, he is not required to hold his office hours at any particular time or place, unless required by statute, and is not required to deliver his records or papers to any one as his successor, except where there be a statutory requirement; but he is nevertheless a public officer<sup>24</sup> in the sense that his office affects the people generally, and does not concern alone a particular district or private individuals.<sup>25</sup>

The subject of jurisdiction of notaries relates to the place and places in which they may perform the several functions of their office, and not the functions or powers and duties. As a general rule, the jurisdiction of notaries is local and confined to the particular court or district in the state for which they are commissioned; but there are exceptions, and, in some states, notaries may act with full official powers throughout the state, so long as they reside in the place for which they are appointed.<sup>26</sup> In Arizona, Connecticut, Indiana, Maryland, Michigan, Minnesota, New York, Oregon, South Carolina, Vermont, Washington, and Wisconsin, notaries may act throughout the state, and are not confined to the counties in which they reside. In Indiana, while they are

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<sup>23</sup> 106 U. S. 546 (1882).

<sup>24</sup> 74 Ga. 416 (1885).

<sup>25</sup> 14 Iowa 464 (1863).

<sup>26</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 16, p. 756.



authorized to act throughout the state, they cannot be compelled to act outside of their respective counties. In New York, a notary for either of the counties of Kings, Queens, Richmond, Westchester, Putnam, Suffolk, Rockland, Orange, Dutchess, or the city or county of New York, may exercise any of the functions of his office in any of these counties, by procuring from the clerk of his county a certified copy of his appointment and filing the same with his autograph signature in the clerk's office in any of the other of said counties.<sup>27</sup> In Alabama, Illinois, Kansas, Kentucky, Montana, Nebraska, Ohio, Tennessee, West Virginia, and Wyoming, a notary may exercise his functions only in the county or place named in his commission.<sup>28</sup>

In Pennsylvania, formerly, a notary was confined, in the performance of his duties, to his own county, but, by statute, it is now lawful for any notary whose commission directs him to reside in any city or borough in any of the counties of the commonwealth in which any said city or borough may be located, to have his domicile in any part of said county or of the adjoining counties, provided that he shall keep an office in the said city or borough or county named in the commission, and that all notarial acts heretofore or hereafter performed by notaries public of that commonwealth, when a notary is not within the county for which he was commissioned, shall be as valid and legal as if he were at the place for which he is commissioned.<sup>29</sup> The purpose of this is that the notaries may have known places where they may be found when wanted. As declared in a state court decision, "they are as much state officers as judges of the supreme court or common pleas. They may have an office in the county in which they are commissioned to reside, but not elsewhere. They have the right to demand payment, protest for non-payment, and serve notices thereof anywhere within the state and outside of it also. They may serve

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<sup>27</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 16, p. 756, citing 11 Abb. New Cas. (N. Y.) 145 (1882); 49 How. Pr. (N. Y.) 277 (1875).

<sup>28</sup> *Ibid.*, p. 757, note.

<sup>29</sup> Pa. P. L., 1893, p. 323, Secs. 1, 2.



United States courts and with the federal officials as if made before justices of the peace.<sup>33</sup> By act of congress, notaries are declared to be proper officers before whom to take testimony and the verification of bills, answers, and affidavits in injunction proceedings in equity;<sup>34</sup> also, to take affidavits required to be made under the mining laws;<sup>35</sup> and it is declared to be within the legal functions of a notary to take the deposition of a witness who lives more than a hundred miles from the place of trial, or who is about to leave the United States, or to go on a sea voyage, and such deposition will be received in evidence in the federal court before which the cause is pending. Notaries are also empowered to take depositions in admiralty cases.<sup>36</sup> In connection with the national banks in the United States, notaries are empowered to administer the oath required to be taken by directors of such institutions, and to take affidavits made to the reports of such banks, provided the officiating notary, in such case, be not an officer of the bank whose report is to be attested.<sup>37</sup>

In matters pertaining to bankruptcy proceedings, in the United States courts, notaries are empowered under the act of congress of 1874, to swear the petitioners for the benefit of such laws to their schedules; to take proof of debts against a bankrupt and acknowledgment of creditors to powers of attorney, and perform divers acts in connection with such proceedings.<sup>38</sup> Thus, it is declared that the certificate of a notary public in Liverpool of the authority of English assignees of bankruptcy, is sufficient to enable them to be admitted as defendants in a suit against bankrupts in the United States.<sup>39</sup> Under the recent bankruptcy law, oaths required, except upon hearings in court, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the

<sup>33</sup> U. S. R. S., Sec. 1,778.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, Sec. 2,335.

<sup>36</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 16, p. 766, citing U. S. R. S., Secs. 863, 864.

<sup>37</sup> U. S. R. S., Sec. 5,211.

<sup>38</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 16, p. 766.

<sup>39</sup> *Ibid.*, citing 1 Cranch C. C. (U. S.) 128 (1803).

United States, or under the laws of the state where the same are to be taken, and by United States diplomatic and consular officers in foreign countries. So that by this law, notaries public are at present empowered to administer oaths in bankruptcy proceedings, except upon hearings in court.<sup>40</sup>

**11. Taking Depositions.**—A **deposition** is the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity.<sup>41</sup> The powers of notaries to take depositions are common with other officers. In the United States, in more than two-thirds of the states, notaries exercise this power by virtue of their position; in others, the power is conferred by statute, which governs the manner of taking the depositions.<sup>42</sup> Depositions proper are of statutory origin and are taken by virtue of a commission, or under an agreement. When taken under commission, notaries public have no authority to take them unless the commission be directed to them. Under an agreement, when no officer is specially designated, a notary by virtue of his office may take depositions; under the Roman law he might reduce evidence to writing and certify thereto, though some officer authorized to administer oaths must swear the witness. Under the common law and the law of nations, when *letters rogatory* are issued—that is, when an instrument is issued by and under the authority of a judge in one county to a judge in another, requesting the latter to cause a witness to be examined, upon interrogatories filed in a cause depending before the former—a notary may, under the direction of the judge to whom such letters are sent, reduce to writing the testimony of the witness and certify thereto, although such testimony must also bear the certificate of the judge showing the authority of the notary to act.<sup>43</sup>

It is necessary that every statutory requirement as to the taking of depositions be complied with. A notary who has any interest in the result of the suit in which a deposition is to be used, or is of counsel for, or related, either by affinity

<sup>40</sup> Bank. Law of 1898, Sec. 20.

<sup>42</sup> Proff. Not., Secs. 20, 70.

<sup>41</sup> 23 N. J. Law 49 (1850), at p. 54, citing Jac. Law Dict.

<sup>43</sup> Not. Man., Sec. 9; Proff. Not., Sec. 23; Bouv. Law Dict.

or consanguinity, to any party to the suit, is incompetent to take such deposition.<sup>44</sup> But the fact that the notary has his office with the attorney of the party for whom the deposition is being taken is not sufficient to disqualify him,<sup>45</sup> and the deposition need not show on its face that the officer is not related to either party.<sup>46</sup>

**12.** The power of a notary to take depositions embraces the power to issue subpoenas for witnesses, but the power to compel their attendance and testify, and to punish them for contempt, exists only where it is specially conferred by statute or where it is incidentally conferred on the officer empowered to take depositions. A *subpoena* is a process, or writ, to cause a person to appear before a court or magistrate therein named, at a specified time and place, and give testimony in a cause, under penalty. It takes its name from the Latin words, *sub pœna*, and it is distinctively a *subpœna ad testificandum*,<sup>47</sup> meaning a summons to testify under penalty. A subpoena *duces tecum* is a writ of the same kind, including the clause requiring the witness to bring with him and produce to the court or official conducting the judicial proceeding, books, papers, etc. in his hands, tending to elucidate the matter in issue.<sup>48</sup> Generally, on proof of service of a subpoena upon the witness, and that he is material, an attachment may be issued against him for a contempt, if he neglect to attend as commanded. Where the power to punish for contempt is lodged in a notary public, as in Arkansas, Kansas, Missouri, and Texas, the punishment prescribed is a fine varying from five to fifty dollars, and, in the first and last named states, the offending witness may also be imprisoned.<sup>49</sup>

If a witness be in contempt for not obeying the subpoena, or for other cause, the proper proceeding of the notary is to enter a conditional judgment against him, adjudging him guilty of contempt, unless he shall appear and show cause why the judgment should not stand, and then institute an

<sup>44</sup> Not. Man., Secs. 135, 136.

<sup>45</sup> 75 Ill. 367 (1874).

<sup>46</sup> 11 Humph. (Tenn.) 84 (1850).

<sup>47</sup> Bouv. Law Dict.

<sup>48</sup> 2 Black. Comm. 382.

<sup>49</sup> Not. Man., Sec. 147.



investigation in the nature of a hearing, at which the witness shall have an opportunity to purge himself, otherwise the judgment of contempt shall be final and the punishment fixed according to the statutory provision governing such proceedings in the particular state.

In some states, before a notary can officiate in taking depositions under a commission directed generally to any notary or other officer, the law requires the fact that the notary is a duly qualified and acting officer shall be certified to by the judge, or the clerk of the court, of the county or district of the notary's domicil. Such certificate is not required where the depositions are to be taken by agreement between the parties to the cause before a particular notary, or where the commission is addressed to the particular notary acting, nor is it necessary when the notary has been appointed by order of the court, as a commissioner, to take depositions.<sup>50</sup>

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### PROTEST OF COMMERCIAL PAPER

**13.** The ordinary and most important duties of a notary public concern the dishonor and protest of commercial paper, or negotiable instruments. The dishonor of an instrument (the refusal or neglect to pay it at maturity) and the protest (the solemn declaration that an instrument is dishonored) are explained in detail in another part of this work, where, also, the duties of notaries relative to dishonor and protest, and the law respecting notarial certificates as evidence, are fully stated.<sup>51</sup> That which remains of this particular subject to be discussed pertains chiefly to the manner in which the notary's functions respecting the dishonor and protest of commercial paper are to be performed.

The duties of a notary public are of an official character, and a due administration of his powers in this regard is governed by substantially the same rules of responsibility as govern in other official transactions.<sup>52</sup> By accepting the

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<sup>50</sup> Not. Man., Sec. 172.

<sup>51</sup> See *The Law of Commercial Paper: Dishonor, Protest*.

<sup>52</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 16, p. 763.

office and entering upon the discharge of his duties, a notary public contracts with those who employ him that he will perform such duty with integrity, diligence, and skill, and a party employing a notary is not obliged to determine the validity or legality of his acts.<sup>53</sup> Due diligence is particularly required of a notary in the discharge of his duties respecting commercial paper, and, in the exercise of such diligence, the notary is required to resort to all proper sources within his reach to obtain the necessary information to enable him to perform his duties.<sup>54</sup>

The general rule is that due diligence is the exercise of the same degree of care usually observed by prudent business men in relation to their own immediate interests. When, for instance, the maker's name to a note is illegible, the notary, in making protest, must make reasonable endeavors to ascertain the person thus indistinctly signified. If he neglect such duty, or misdescribe a name, whereby an indorser is misled, the protest will not be available as to such party.<sup>55</sup>

Whether or not due diligence be used in making inquiry for the residence or place of business of the maker or indorser of an instrument is a mixed question of law and fact; the court must state the law to the jury, according to the circumstances as they appear, but the jury must determine the fact.<sup>56</sup> Thus, where the notary makes inquiry at the bank where the paper was payable and obtains information as to the residence of an indorser, upon the faith of which information the notary addresses the notice of protest, the jury will be justified in finding that a proper degree of diligence had been exercised by the officer.<sup>57</sup> Where the maker of a promissory note resided in Baltimore, inquiring for him by the notary at the post-office, exchange, and court house was judicially declared to be insufficient. Efforts should have been made to learn if he had a residence in the city, by examination of the city directory, and the demand

<sup>53</sup> 10 Cal. 239 (1858).

<sup>54</sup> 51 N. Y. 84 (1872).

<sup>55</sup> 45 N. J. Law 395 (1883).

<sup>56</sup> 111 Pa. 193 (1885).

<sup>57</sup> 41 N. J. Law 225 (1879).

made upon him and left at his place of abode.<sup>58</sup> However, a notary will not be regarded as exercising due diligence if he rely on the city directory;<sup>59</sup> that is only auxiliary to the end. If he cannot find the address in the directory or procure it from the holder of the instrument, or an indorser if one be in reach, he should make diligent inquiry of those he deems most likely to know.<sup>60</sup> If the notary receive the instrument from a bank, he should apply to the cashier for instructions.<sup>61</sup>

**14. Acting by Deputy.**—The principles which govern the acts of notaries in the making of presentment and demand of negotiable paper and in giving notice of dishonor, are explained elsewhere;<sup>62</sup> but, as these principles apply specially to the duties of notaries, they are further treated in this title.

The common-law rule required presentment and demand of a bill of exchange to be made by the notary in person, but this has been changed by statute, as stated before, permitting these formalities to be made by the notary's clerk, or deputy. So, also, as to protest and notice; it is sufficient if these acts conform to the law of the place where it is made. In New Orleans, for instance, where each notary public is authorized by statute of Louisiana to appoint one or more deputies to assist him, a deputy notary may act in the place of his principal, in certain cases, and his acts are valid and binding.<sup>63</sup> If the law of the place where the bill is payable sanction the demand by the clerk of the notary, and the making out and signing the protest by the notary himself, it will be regarded as a valid protest.<sup>64</sup>

As before stated, in our discussion of the law of commercial paper, in England and in some of the United States, the practice is to present and demand by a clerk of a notary.<sup>65</sup> Before the protest is made, it is the custom, in England, to cause the bill to be presented either by a notary or his clerk

<sup>58</sup> 90 Md. 464 (1869).

<sup>59</sup> 53 Mo. 591 (1873).

<sup>60</sup> 59 Mo. 583 (1875); 49 N. Y. 269 (1872).

<sup>61</sup> 4 How. (U. S.) 336 (1846).

<sup>62</sup> See *The Law of Commercial Paper: Dishonor, Protest*.

<sup>63</sup> 7 Humph. (Tenn.) 548 (1847).

<sup>64</sup> 4 B. Monr. (Ky.) 600 (1844).

<sup>65</sup> See *The Law of Commercial Paper: Protest*; 49 N. Y. 269 (1872).

(in general his clerk presents it) and acceptance to be demanded. The usage is amply justified by the law of principal and agent.<sup>66</sup> In the United States, where it can be shown that it is the common and universal usage at the place where the bill is payable for notaries' clerks to make presentment and demand, these formalities, so made, are sufficient;<sup>67</sup> but the usage allowing it must be clearly proved to sustain the presentment of a foreign bill by a notary's clerk.<sup>68</sup>

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## LIABILITY FOR NEGLIGENCE AND MISCONDUCT

**15.** Liability attaches to notaries public for negligence and misconduct in office that results in loss or damage to the parties by whom they are engaged. The various duties of notaries, as previously stated, are of an official character, and the same diligence in the administration of their official powers is required by substantially the same rules of responsibility that govern in other transactions. It is obvious that if a notary, acting in an official capacity, honestly make a mistake, he cannot be held liable in damages. Where, however, he neglects to perform his duty, or, by his misconduct in the performance of some official act, causes loss to the party for whom he has undertaken to act, he will be held responsible therefor. The sureties on a notary's bond are liable only for the negligence or misconduct of the notary in the performance of his official acts; they cannot be held liable for an act not authorized by law, though he do it in his capacity as a notary. When the sureties on a notary's bond are liable, the liability is incurred only to such persons who have employed the notary and who have suffered injury on account of the notary's failure to perform the duty incumbent on him, as required or authorized by law.<sup>69</sup>

Where a notary falsely certifies the performance of an act which the law includes within his official duties, it is a breach of his bond, and his sureties are liable to the person or persons who sustain damages thereby; and, in some states.

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<sup>66</sup> Chit. Bills (10th Eng. Ed.).

<sup>67</sup> 49 N. Y. 269, 275 (1872).

<sup>68</sup> 6 B. Monr. (Ky.) 60 (1845).

<sup>69</sup> 21 Am. St. Rep. 408 (1890).

the notary is made liable to a criminal prosecution for misdemeanor.<sup>70</sup> In verifying the acknowledgment of a deed or mortgage, if the grantor or mortgagor did not, in fact, execute the instrument, and, in consequence, the title or security fails, the party injured may look to the officer for redress.<sup>71</sup> So, also, where the notary certifies to personal knowledge of the grantor, and the party is a stranger, the notary gives such assurance at his peril, and may be held to answer for all damages resulting from the fact that the party proved to be an impostor. In such case, it is held to be the duty of the notary to call witnesses to prove the identity of the person desiring the certificate, and the failure to employ such precaution constitutes gross negligence.<sup>72</sup> Where a notary has no personal knowledge of one who appears before him to acknowledge a deed, he may administer to him an oath and examine him for the purpose of determining his identity, and, if the person falsely swear that he was the identical person who signed the instrument, he will be guilty of perjury.<sup>73</sup> But the oath of the party himself is not sufficient to warrant the notary in accepting his testimony as an identification; he should cause the identity to be proved by at least two witnesses who possess knowledge of the identity of the grantor.<sup>74</sup>

**16.** The sureties on an official bond of a notary public are liable for any loss or damage caused by his affixing his notarial paraph to any mortgage note which he knew to be forged; any one injured by his act has a right of action on the bond against his sureties.<sup>75</sup> So, also, liabilities will attach to a notary and his sureties for failure to file a mortgage which the notary had drawn up and agreed to have recorded, where by reason of his neglect the party lost his security, another mortgage having obtained priority of record.<sup>76</sup>

In like manner, the notary is responsible for neglecting to

<sup>70</sup> 7 La. Ann. 95 (1852).

<sup>71</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 16, pp. 780, 781, citing 39 Mich.  
456 (1878).

<sup>72</sup> *Ibid.*, citing 2 Mo. App. 413 (1876).

<sup>73</sup> 64 Cal. 267 (1883).

<sup>74</sup> 2 Mo. App. 413 (1876).

<sup>75</sup> 29 La. Ann. 82 (1877).

<sup>76</sup> 73 Ind. 17 (1880).



give notice of protest of negotiable paper, or if he make a false certificate of the same, by which failure or misconduct the indorser is discharged. Such action is judicially declared to be a breach of the notary's official bond.<sup>77</sup> As we have seen, when a notary undertakes to give notice of protest, he is bound to exercise due diligence—care and skill, as it is stated by some text writers—and, if he fail to obtain all the information which can with reasonable endeavor be obtained, as to residence, place of business, or whereabouts of the parties to be notified, or, after obtaining such information, he fail to properly and duly issue and mail or deliver such notices, he will be liable for negligence.<sup>78</sup>

In order to avoid any liability for any mistake that may occur in making protests, the notary must be able to show that such mistake did not occur from any want of care, diligence, or skill, on his part.<sup>79</sup> And in all cases, the negligence complained of must be gross and palpable, or the act in question malicious or corrupt, and even then a party who sustains no loss therefrom has no right of recovery against the notary. A reasonable excuse for failing to perform the act required may exonerate the officer from liability; and the same is true where the party himself is at fault, for, to enable the holder of a bill or note to recover, the negligence of the notary must be the proximate cause of the loss or damage sustained; if the holder be guilty of negligence or laches, he cannot recover.<sup>80</sup> Where the holder of a bill directed the notary to protest it on a certain day, the day mentioned in the direction not being the day of the maturity of the instrument, it was held that the notary, acting under the direction of the holder, was not liable for the mistake.<sup>81</sup>

<sup>77</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 16, pp. 781, 782, citing 6 Cal. 633  
(1856).

<sup>78</sup> Not. Man., Sec. 290.

<sup>79</sup> *Ibid.*

<sup>80</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 16, pp. 782, 783, citing 26 W. Va.  
829 (1885); 5 Cal. 419 (1855).

<sup>81</sup> 49 N. Y. 269 (1872).

## NOTARIES AND MARITIME PROTESTS

**17. Definition.**—A protest, in maritime law, is a written declaration made and verified by the master of a vessel, and attested by a notary public, magistrate, justice of the peace, or consul, setting forth the cause and circumstances attending an injury that has happened to the vessel or the cargo, and showing that it was not owing to negligence, want of skill, vigilance, or exertion on the part of the officers or men of the ship.<sup>82</sup>

In the course of the voyage, the master of a ship or vessel is bound to take all possible care of the cargo, and he is responsible for every injury which might have been prevented by human foresight and prudence, and competent naval skill. He is chargeable with most exact diligence. On his arrival in port, the master, in case of a disaster, is bound to give a written, verified statement of the circumstances attending the voyage, and the loss. The French law requires the master, within twenty-four hours after his arrival in port, to make his report (*rapport*, or protest, in the language of the English and American mercantile law), containing the place and time of his departure, the course he has kept, the dangers he has run, the accidents, and all the remarkable circumstances of the voyage. The report is made to the Tribunal of Commerce, and, if in a foreign port, before the French consul, and, in the absence of either, before a magistrate.<sup>83</sup>

By the practice in England and the United States, the master's protest is made before a notary; in England, by solemn verification instead of oath,<sup>84</sup> and by oath, in the United States, where the statute regulating maritime protest provides that "if any vessel from any foreign port, compelled by distress of weather or other necessity, shall

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<sup>82</sup> Stand. Dict.; Bouv. Law Dict.

<sup>83</sup> Kent's Comm., p. 213, and note.

<sup>84</sup> Stat. 6, Wm. IV.

put into any port of the United States, not being destined for the same, the master, together with the mate or person next in command, may, within twenty-four hours after her arrival, make protest in the usual form, upon oath, before a notary public . . . setting forth the cause or circumstances of such distress or necessity.<sup>85</sup>

It is required of the notary that he shall note the protest in his official records, according to a common form used, given within the prescribed time; a more extended statement may subsequently be made before him or another notary.<sup>86</sup>

**18. The Protest as Evidence.**—Though the protest is not evidence for the master or his owners, yet it is evidence against them, and is received as evidence in foreign courts; it is of great utility in matters of adjustment of losses, and much consideration is given to it by merchants.<sup>87</sup>

**19. Registry of Boatmen.**—In Missouri, as provided by statute, a notary public may take the acknowledgment of the parties to all contracts and agreements entered into by any person for rowing or navigating any boat or vessel of any description in the navigable waters within that state, or between the master or commander of any boat on a voyage from any place within that state, and any boatman, engaged or bound, of such boat or vessel. It is further provided that the original, or a copy, of such contract, duly acknowledged, shall be received in evidence in any court of that state.<sup>88</sup>

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<sup>85</sup> U. S. R. S., Sec. 2,891.

<sup>86</sup> Not. Man., Sec. 304; see *Book of Forms*.

<sup>87</sup> Abb. Sh. 466.

<sup>88</sup> Mo. Rev. Stat., Secs. 5,071-5,073.



# THE LAW OF JUSTICES OF THE PEACE

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## DEFINITION AND HISTORY

1. A justice of the peace is an inferior or local judge chosen in each county, town, or district, to preserve the peace, to try minor causes, and to discharge other functions, as the legalizing of papers for record.<sup>1</sup>

In England, early in the 14th century, certain peculiar officers were appointed by the common law for the maintenance of the public peace, some of which were known as conservators of the peace. Queen Isabel, the wife of Edward II, contrived to depose her husband by a forced resignation of the crown and had set up his son Edward III in his place. This being a thing without example in England, it was feared would much alarm the people, especially as the old king was living, though hurried about from castle to castle, till at last he met with an untimely death. Therefore, to prevent any risings or other disturbances of the peace, the new king caused parliament to ordain that good men in every county should be assigned to keep the peace. Thus was the election of conservators of the peace taken from the people and given to the king, this assignment being construed to be by the king's commission; but they were still called conservators, wardens, or keepers of the peace, until the passage of a statute gave them general power to try felonies, and then they acquired the more honorable appellation of justices.<sup>2</sup>

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<sup>1</sup> Cent. Dict.

<sup>2</sup> 1 Black. Comm. 349-351.

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During the reign of Queen Elizabeth the office assumed nearly the form in which it exists today.<sup>3</sup> It thus appears that the authority of a justice of the peace, in its origin, was purely ministerial—to prevent breaches of the peace and bring criminals to justice. His acquired civil power is wholly statutory, and where none is expressly conferred he does not possess any.<sup>4</sup>

In the United States, the growth of this office began from the mere ministerial one that it was in England, being so established in the colonies, with only criminal jurisdiction at first, but subsequently securing by statutory enactment cognizance of civil cases of small pecuniary concern, which has been enlarged from time to time so as to include causes involving larger amounts, and actions of debt, assumpsit, trespass, summary proceedings, attachment, replevin, and forcible entry and detainer. The limit as to the amount in controversy varies from one hundred dollars to three hundred dollars. Formerly torts and actions for unliquidated damages were not included,<sup>5</sup> but the tendency of modern legislation is to include actions of torts.<sup>6</sup>

### CORRELATIVE OFFICERS

**2. Justices of the Quorum.**—Justices of the peace are not classified into different kinds, although in the matter of jurisdiction their powers differ in some respects. In the English system, something akin to grades grew out of the practice of constituting justices of the quorum, a distinction conferred upon some of the justices in each county, by directing, in the commission authorizing the holding of quarter sessions, that among those holding the court must be two or more of several specially named. Sitting as justices of the quorum, any two or more had power to inquire into and determine felonies and misdemeanors. The commission named some particular justices, or one of them, to be included in the quorum, and the presence of the person

<sup>3</sup> Stat. 32 & 33 Eliz.

<sup>4</sup> 31 N. J. Law 47 (1864), citing 1 Salk. (Eng.) 406.

<sup>5</sup> Bouv. Law Dict.

<sup>6</sup> See *subtitle Jurisdiction infra*.

or persons so named was always necessary to give legality to the proceedings.<sup>7</sup> In the United States, there is little mention of justices of the quorum in the textbooks or decided cases. In Maine, it is held that where the statute requires the presence of a given number of justices of the quorum, that number is necessary to the legality of the proceedings specified.<sup>8</sup>

**3. Borough Justices.**—A justice of the peace in England, by the early statutes, was a county officer. At first, two or three were appointed in each county; subsequently, four, six, and eight successively were named, and the increase of matters within the jurisdiction of justices necessitated a still greater increase in their number. These justices had jurisdiction in their respective counties. In the boroughs, there were created special justices, *ex officio* peace officers, known as **borough justices**. It was necessary, however, for the act creating borough justices, to declare in terms that the jurisdiction in the borough belonged to the borough justice and not to the county justice, within whose district the borough was situated; and the authority of the borough justice could, therefore, be exercised only in the borough to which he was appointed.

**4. Magistrates and Aldermen.**—Besides the classes of justices above described, there are officers known as magistrates, aldermen, charter justices, and stipendiary magistrates.

The word *magistrate*, in its general acceptation, signifies any person in authority—a ruler of whatever sort. In this sense a king, a president, a governor, a sheriff, a justice of the peace, each is a magistrate. The term, therefore, comprehends all of the officers herein described. The president of the United States is the chief magistrate of that nation; the governors of the respective states are the chief magistrates thereof. Specifically, a magistrate is the presiding officer of a municipal court, not of record, with such jurisdiction of civil and criminal causes as is conferred by statute, and

<sup>7</sup> 1 Black. Comm. 351.

<sup>8</sup> 19 Me. 454 (1841).

possessing the same duties as a peace officer as are commonly possessed by a justice of the peace.

In England, it is customary to apply the term *justice of the peace* to persons whose names are in the commission of the peace for counties, ridings, and divisions, and the term *magistrate* to those who act for cities, boroughs, or other chartered districts. For this reason, both justices of the peace and magistrates, in England, may be described as judges of record appointed by the king's commission to be justices within certain limits for the conservation of the peace, and for the execution of divers things comprehended within their commissions.<sup>9</sup>

**5.** An **alderman** in the United States is a judicial officer in a city authorized to be chosen by the charter or act of incorporation of the city, from which, and by virtue of general statutes, he derives his powers and jurisdiction. He is the same sort of official in the district in which he officiates as a magistrate or justice of the peace is in each of their respective districts. In addition to the powers conferred by statutes, aldermen have special jurisdiction of prosecutions and suits under the ordinances of the cities in which they officiate, with particular powers in reference to the police and government thereof.<sup>10</sup> Although an alderman has jurisdiction in his ward, his process or writs may be served anywhere within the city. Usually, the forms of procedure in the court of an alderman are the same as those of a justice of the peace or magistrate. His authority as a justice of the peace is derived from the laws of the state in which he officiates, and he is bound in this regard by the statutes of his state applying to justices of the peace.

In some of the larger cities of the United States, there are boards of aldermen composed of the aldermen representing each ward, which boards form the upper house of the municipal legislature of those cities; in other cities, the aldermen are members of the mayor's court, which has jurisdiction

<sup>9</sup> Saund. Mag. Pr. (5th Ed.), by J. A. Foote, p. 2.

<sup>10</sup> McKinn. Jus. (4th Ed.), pp. 138, 139.

over certain offenses.<sup>11</sup> The office of alderman has been abolished in some of the great centers of population to be superseded by the office of magistrate who, as has been seen, possesses the same powers, jurisdiction, and duties as those exercised by an alderman or a justice of the peace. In Philadelphia, where this has taken place, provision was made for the change in the state constitution, as follows: "In Philadelphia, there shall be established for each thirty thousand inhabitants, one court, not of record, of police and civil causes, with jurisdiction not exceeding one hundred dollars; such courts shall be held by magistrates, whose term of office shall be five years; . . . and shall exercise such jurisdiction, civil and criminal, except as herein provided, as is now exercised by aldermen, subject to such changes, not involving an increase of civil jurisdiction or conferring political duties, as may be made by law. In Philadelphia, the office of alderman is abolished."<sup>12</sup> This provision was made previous to the enactment of the statute enlarging the jurisdiction of justices of the peace, aldermen, and magistrates in civil causes to actions wherein the sum demanded does not exceed three hundred dollars.<sup>13</sup>

In English law, an alderman is defined as an associate to the chief civil magistrate of a corporate town or city.<sup>14</sup> In the Anglo-Saxon period of English history the title meant simply chieftain or lord, but was used later to denote specifically the chief magistrate of a county or group of counties. The aldermen of the city of London were probably, originally, the chiefs of guilds. In England and Ireland, besides being a member of the common council, which manages the affairs of the municipality, an alderman is vested with the powers of the police judge. The corresponding title in Scotland is *bailie*.<sup>15</sup>

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<sup>11</sup> McKinn. Jus. (4th Ed.), p 139.

<sup>12</sup> Const. Pa., 1874, Art. V, Sec. 12.

<sup>13</sup> Pa. P. L., 1879, p. 194, Sec. 1.

<sup>14</sup> Bouv. Law Dict. Note: The word *alderman* was formerly of very extended signification. Spellman enumerates eleven classes of aldermen. Their duties among the Saxons embraced both magisterial and executive power, but would seem to have been rather an appellation of honor, originally, than a distinguishing mark of office.

<sup>15</sup> Cent. Dict.

**6. Charter Justices and Stipendiary Magistrates.**

The city of London, and many other cities and boroughs in England that are not within the Municipal Corporation Act,<sup>16</sup> possess charters or grants from the crown, under which justices of the peace are appointed instead of by the ordinary commission.<sup>17</sup> Besides these, stipendiary justices, or salaried police magistrates, are appointed by the home secretary upon the resolution of the town council in the case of a borough, under the Municipal Corporation Act, or the local board of a city or place having a population of twenty-five thousand persons, in the case of a place not being a municipal corporation, which officials possess the authority and jurisdiction of justices of the peace.<sup>18</sup>

**ELIGIBILITY AND SELECTION**

**7. Qualifications.**—In general, the qualifications of a person to be eligible to the office of justice of the peace are the same as are prescribed for any other public officer. In the United States, no particular qualifications are specified by any law, but it is a recognized custom to select only those who are citizens of the county and of the state in which they are appointed or elected. Residence in the respective districts for which they are chosen is required. It is requisite also that the persons should be of good moral character and of full age.<sup>19</sup> Minors and women are held to be ineligible.<sup>20</sup> In England, additional qualifications are that the person must have been for two years immediately preceding his appointment the occupier of a dwelling house situated in England or Wales of the assessed value of at least one hundred pounds, upon which he must have paid the taxes during that time.<sup>21</sup>

**8. Disqualifications.**—The common-law disqualifications of a justice of the peace are, acceptance of an

<sup>16</sup> Stat. 5 & 6 Wm. IV, c. 76.

<sup>17</sup> Sand. Prac. Mag. Courts (5th Ed.), p. 14.

<sup>18</sup> Bouv. Law Dict.; Stat. 21 & 22 Vict., c. 73.

<sup>19</sup> Murf. Jus. Prac., Secs. 9-11; 20 Pa. Co. Ct. 405 (1898).

<sup>20</sup> 24 Am. Rep. 66 (1876); 107 Mass. 604 (1871).

<sup>21</sup> Stat. 38 & 39 Vict., c. 54.



incompatible office and conviction of crime. By statutes, in the United States, a justice of the peace is disqualified from officiating in certain cases, as where he is related to either party in interest in a suit,<sup>22</sup> but the relationship must be so near as to raise of itself evidence of partiality.<sup>23</sup> By statute, in Connecticut, the justice is disqualified when "he or his son, father, brother, father-in-law, partner, clerk, or student, or any other person occupying the same office, shall act as attorney, or shall draw up the declaration."<sup>24</sup>

The rule that certain officers cannot hold incompatible offices applies to justices of the peace. In England, by statute, offices incompatible with the office of justice of the peace are those of sheriff and county treasurer.<sup>25</sup> In the United States, by statute, the offices incompatible with the office of justice of the peace are those of town clerk, constable, deputy clerk of the county court, sheriff, deputy sheriff, and, by the constitution of Arkansas, state treasurer; but, in some states, the same person may fill the office of justice of the peace and be a member of the legislature, city clerk, or register of deeds.<sup>26</sup> Federal offices that have been held to be incompatible with the office of justice of the peace are those of postmaster, assistant postmaster, and one under contract with the government to carry the mails.<sup>27</sup> Offices which have been held compatible with the office in the United States, are those of members of the legislature, city clerk, and register of deeds.<sup>28</sup>

**9. How Constituted.**—In England, justices of the peace are appointed by the king, through the lord chancellor, except in the Duchy of Lancaster, where the appointment, though made by the crown, is effected through the chancellor of the Duchy. In some of the United States, justices of the peace are appointed by the governor to hold

<sup>22</sup> 11 Hun (N. Y.) 204 (1877).

<sup>23</sup> 17 Johns. (N. Y.) 133, 191 (1819).

<sup>24</sup> Conn. Pub. Acts, 1887, p. 686, c. 50.

<sup>25</sup> 4 B. & Ad. (Eng.) 9 (1832); 12 B. & D. (Eng.) 133 (1875).

<sup>27</sup> 14 Vt. 428 (1842); 4 Leigh (Va.) 643 (1832).

<sup>28</sup> 32 Me. 526 (1851); 52 Ind. 599 (1876); 68

Me. 594 (1878).

<sup>26</sup> 3 Me. 487 (1825); 38 N. Y. App. Div. 539 (1899); 25 Conn. 565 (1857); 73 Me. 129 (1882); 5 N. C. 485 (1810); 10 Ark. 142 (1849); 64 Me. 195 (1874); 2 Ark. 282 (1840).

office during good behavior or for a certain length of time, but in most states they are elected for a term of years specified in the constitution, for particular counties, townships, or districts, as the case may be. The matter of selection is entirely dependent on the constitution and the statutes of the various states. In cities having magistrates, it is customary for all voters of the city to ballot for the full number of such officials, and their assignment to districts or wards is performed either by all the magistrates at a collective meeting, or, in some states, in other ways, as prescribed by the constitution.

**10. Oath of Office and Bond.**—Before any person who has been appointed or elected to the office of justice of the peace can lawfully enter upon the discharge of his duties he must subscribe to the oath of office and file a bond. In the United States, the oath to be subscribed by a justice of the peace is the same as that required to be taken by other judicial officers, and consists of swearing or affirming to support the constitution of the United States and the state in which he is to officiate, and to perform faithfully and impartially the duties of the office.<sup>29</sup> In England, a justice of the peace is required to take the oath of allegiance to the ruling sovereign and also the judicial oath, by which he binds himself to truly serve the sovereign and “to do right to all manner of people after the laws and usages of the realm, without fear or favor, affection or ill will.”<sup>30</sup>

The bond required of a justice of the peace is conditioned for the faithful application by him of all moneys that may come into his hands in his official capacity. It is commonly directed in the statute requiring a bond that the instrument is to be held for the benefit of such persons as may suffer injury from malfeasance in office on the part of the justice. The amount of the bond varies in different jurisdictions and districts.

Where the justice is the owner of real property, equal in value to the amount of the bond required, the bond may be,

<sup>29</sup> 2 Barb. (N. Y.) 320 (1848)

<sup>30</sup> Stat. 31 & 32 Vict., c. 72, Secs. 2, 4.

and often is, dispensed with.<sup>31</sup> It is provided, however, that where a justice who has not been required to file a bond is likely to become insolvent, the court of common pleas of the proper county may require the filing of a bond. The courts have a similar authority where the bond, though filed, has become valueless by reason of the insolvency of the surety.<sup>32</sup>

**11. Seal of Office.**—In some states, it is provided by statute that justices of the peace may provide for themselves and use a seal of office to be affixed to all affidavits, which seal shall be similar to the one used by notaries public, except that around the outer edge shall be the name of the justice, his county, and the words, *justice of the peace*.<sup>33</sup>

**12. Term of Office.**—In England, justices of the peace continue in office during the pleasure of the sovereign—the power which constitutes them. In the United States, wherever the office is an appointive one, the justices hold, in some cases, during good behavior, and, in others, for a term of years.<sup>34</sup> Wherever the office is elective, the term of office is prescribed by constitution or statutes, the length of the term varying from two to five years. In the event of a vacancy by death or otherwise, the governor of the state wherein the vacancy occurs has the power to fill it by appointment, in which case the new incumbent holds the office for a time fixed by the state constitution or by statute, usually until the next succeeding election, when another may be chosen.

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<sup>31</sup> Pa. P. L., 1839, p. 378, Sec. 6.

<sup>32</sup> Pa. P. L., 1846, p. 434, Sec. 5.

<sup>33</sup> Pa. P. L., 1891, p. 143, Secs. 1, 2.

<sup>34</sup> 67 Cal. 633 (1885).

## JURISDICTION

**13.** The **jurisdiction** of a justice of the peace and a similar officer, such as an alderman or a magistrate, is considered with respect (1) to territory; (2) to the parties; (3) to the subject-matter or offense—(a) in civil suits as to, first, actions in law on contract and in tort, and second, in equity; (b) criminal proceedings; (4) his jurisdiction under special laws; and (5) his power as peace officer.

**14. Territorial Jurisdiction.**—A justice of the peace in England is a county, borough, riding, or division, officer. Under the old statutes he was a county officer, with jurisdiction throughout the county. In this respect the office was faithfully copied in the United States. A justice of the peace was elected or appointed for the county with jurisdiction in the entire county. He may now be a county, borough, or township, officer, or an officer for a district of a county. Where he is chosen for a district of a county, his process, that is, his writs, may be served or executed at any place within the county. All of the official acts of a justice of the peace, however, must be performed within the district for which he was commissioned. Anything done by him beyond the limits of his district is void. But this rule is not universal.<sup>35</sup> In New York and a few other states, a justice of the peace is a county officer and has jurisdiction anywhere within the limits of the county.<sup>36</sup> In New Hampshire, he has criminal jurisdiction of certain cases in the entire state. His civil jurisdiction likewise extends to any or all of the counties of the state. This, to a more restricted extent, is also true in Maine.<sup>37</sup> Generally, unless a justice of the peace be authorized by statute to issue and serve process without his county, he has

<sup>35</sup> 54 Ark. 137 (1891); 69 Ill. 371 (1873); 35 Kans. 714 (1886); 15 Me. 188 (1838); 15 Mass. 280 (1818); 53 Mass. 521 (1876).

<sup>36</sup> N. Y. Rev. Stat., Vol. 1, Sec. 5.  
<sup>37</sup> 77 Me. 588 (1885).

no jurisdiction to do so. No agreement of parties can confer on him the right to take cognizance of cases outside of his statutory territorial jurisdiction.

In most jurisdictions, it is required by statutes that actions before a justice must be brought where one, at least, of the parties resides. His jurisdiction is sometimes restricted to the township or city for which he is elected or appointed. To this, in a few instances, is added jurisdiction in an adjoining township in the county under certain named and defined circumstances. Where he is acting in the capacity of a justice of a police court of a town or city, his jurisdiction is confined, generally, to the city or town of his appointment or election. The same is true of mayor's courts, and other inferior courts of like nature.<sup>38</sup> In cities where there is a large number of aldermen, the jurisdiction of each alderman, so far as the service of writs and like matters is concerned, extends throughout the city, but his official acts must be done within the ward to which he has been elected or appointed. And where a state constitution or a statute has substituted magistrates for justices of the peace, giving them the jurisdiction formerly possessed by aldermen, their writs may be served throughout the city.<sup>39</sup>

The statutes which invest justices with their powers generally provide for the maintenance of an office in the district, that is, the town, township, or county for which they are chosen. In the absence of such restrictions, the justice is free to hold his court at any place in the county. These provisions apply to residence and holding of court as well.<sup>40</sup> Where a justice has established no other office, his residence is to be considered as his office.<sup>41</sup>

**15. Jurisdiction as to Parties.**—There are various circumstances connected with the parties to a cause trying before a justice, which disqualify him from acting as judge in that particular issue. Such are the facts that he is attorney for one of the parties, or that he is related to one of the

<sup>38</sup> 15 Mass. 280 (1818); 7 Ind. 488 (1856); 67 Mich. 160 (1887); 54 Neb. 452 (1898); 68 Ala. 81 (1880); 92 Cal. 277 (1891).

<sup>39</sup> McKinn. Jus., p. 109.

<sup>40</sup> 36 Kans. 593 (1897).

<sup>41</sup> 3 Wis. 736 (1854).



parties, as before stated. These disqualifying incidents are here particularly stated.

A justice of the peace may not preside at the trial of a cause to which he is a party in interest; but the interest which he must have in a case, to disqualify him, must be a real interest, and one sufficiently great to influence his decision, or at least to raise a bias in his mind to the prejudice of one of the parties. It must also be of a real pecuniary nature.<sup>42</sup> A justice of the peace may not take jurisdiction of an action to which his relative to the fourth degree of consanguinity is a party in interest, and it has been held that a son-in-law is a relative sufficiently near to bias the mind of the justice; or in which he represents either of the parties as attorney. It is not necessary that the justice be attorney in the proceeding itself. If he have represented one of the parties as attorney or agent, it is presumed that he will be biased in favor of his client. In some states, he may not preside in a case to which a justice of the peace is a party.<sup>43</sup>

A justice, otherwise disqualified to try a case in which the parties signify their consent, is authorized by some statutes to take jurisdiction. And where a disqualification exists but no objection is made by either party, the disqualification, in some states, is considered waived by failure to make proper objections. Generally, however, a judgment rendered by a justice, sitting in a case where he is disqualified, is absolutely void.<sup>44</sup>

Actions against constables and other officers may be brought before a justice of the peace, where he has general jurisdiction of actions both of tort and of contract, and where there is no statute excepting actions of like nature from the justice's jurisdiction.<sup>45</sup> Actions by or against executors or administrators fall properly within the sphere of a justice's jurisdiction;<sup>46</sup> but some authorities deny jurisdiction to

<sup>42</sup> 2 D. Chp. (Vt.) 96 (1824); 26 Ont. 540 (1895); 20 Q. B. Div. (Eng.) 58 (1887); 54 Me. 564 (1869).

<sup>43</sup> 110 Ala. 25 (1895); 41 Barb. (N. Y.) 200 (1863); 61 Wis. 498 (1884); 26 Ont. 540 (1895).

<sup>44</sup> 37 N. H. 340 (1858); 6 Cush. (Mass.) 331 (1851).

<sup>45</sup> 37 Ohio 361 (1881); 30 Kans. 346 (1883).

<sup>46</sup> 37 Ill. 428 (1865).

justices of the peace of claims against estates.<sup>47</sup> Such claims usually fall within the jurisdiction of orphans' courts or probate courts. Where the statute regulating the powers of justices confers a general jurisdiction of all cases within a certain amount, or where it expressly confers jurisdiction of such cases on a justice of the peace, he has authority to determine such actions.<sup>48</sup>

Cases in which corporations are plaintiffs or defendants may be brought before a justice of the peace, if the amount at stake be within the justice's jurisdiction. Municipal corporations, as a rule, form an exception to this statement.<sup>49</sup>

Except in cases appealed from his own court, it is proper for a justice to appear as counsel in another court. There are statutes, however, which disqualify him from representing either plaintiff or defendant on appeal from any justice's court.<sup>50</sup>

**16. Jurisdiction as to the Subject-Matter in Civil Suits at Law.**—The civil jurisdiction of a justice of the peace consists of all the powers that have been expressly enumerated in the statutes conferring it. There is no presumption that he has any power; he has none that is not expressly named in the statutes.<sup>51</sup> This is also true of all his jurisdiction. An act which confers jurisdiction upon a justice of the peace in controversies of a given class does not deprive courts which formerly possessed such jurisdiction of their cognizance of such matters.<sup>52</sup> Under these circumstances the jurisdiction is said to be concurrent, because both the higher court and the justice's court have an equal right to try the cases named in the act.

In some of the United States, a justice of the peace is given exclusive jurisdiction over civil matters in which the subject of dispute does not exceed a given sum.<sup>53</sup> In Pennsylvania, exclusive and final jurisdiction over civil matters is given to justices of the peace in which the amount involved is five

<sup>47</sup> 96 Pa. 44 (1880); 158 Ill. 346 (1895).

<sup>48</sup> 55 Iowa 634 (1881).

<sup>49</sup> 4 How. (Miss.) 660 (1840); 77 Mich. 228 (1889).

<sup>50</sup> 9 Gray (Mass.) 366 (1857).

<sup>51</sup> 40 Tex. 472 (1874).

<sup>52</sup> 80 Mo. 409 (1883).

<sup>53</sup> 110 N. C. 24 (1892).

dollars and thirty-three cents, or less, and a similar rule, except as to the amount, obtains in other jurisdictions.<sup>54</sup>

Statutes frequently limit the civil cognizance of a justice of the peace to actions of contract, express or implied. Where such a rule holds, a matter must be within the domain of pure contract to be within the cognizance of a justice.<sup>55</sup> Actions brought upon judgments, for a penalty of any kind, or upon bonds or instruments of like nature, have been construed to be beyond the scope of a justice's authority. But, in some states, the courts hold that a justice's jurisdiction extends likewise to actions on judgments.<sup>56</sup>

It is usual to confine the civil jurisdiction of a justice of the peace to cases of contract where the amount involved is less than a certain sum named in the act of the legislature defining the powers. The limit ranges from one hundred dollars to three hundred dollars. For example, he may be given cognizance of all cases arising from contract, express or implied, where the amount in controversy is less than one hundred dollars. The writ issued by the justice of the peace then states that the defendant must appear on a day named to answer to a claim arising from contract, in amount less than one hundred dollars; in other words, the writ on its face shows that the justice has jurisdiction of the cause. Special actions, which would be included under the general title, "actions of contract involving less than one hundred dollars," are, as a general rule, expressly excepted from the actions falling within the jurisdiction of the justice. Such are questions involving the title to real estate.

Actions upon bonds of various kinds fall within or without the justice's cognizance, according to the method employed in each jurisdiction of enforcing the penalty. There are two ways of enforcing the penalties on bonds: (1) A judgment may be rendered for the amount due on the bond, or for the amount of damages incurred; (2) a judgment may be rendered for the amount of the penalty named in the bond, the obligation of which judgment may be discharged upon

<sup>54</sup> 17 S. & R. (Pa.) 367 (1828).

<sup>56</sup> 16 Cal. 372 (1862).

<sup>55</sup> 48 Ark. 301 (1886); 17 S. & R. (Pa.) 367 (1828).

payment by the defendant of the actual damages proved. Wherever the first method is employed, the jurisdiction of the justice is determined by the amount claimed. If his jurisdiction extend to cases of one hundred dollars or under, the amount claimed must be less than that sum.<sup>57</sup> Wherever the second practice prevails, the penalty named in the bond must fall within the amount which limits the justice's authority.<sup>58</sup>

Where the jurisdiction of the justice's court would conflict with that of a higher court, the statutes often remove the actions over which both courts have jurisdiction from the list of subjects of which he has cognizance. This is the case with actions on accounts and, in some instances, with actions on book accounts; also, where there is a suit for an accounting in a partnership, or some other voluminous account, the same rule holds, as the litigants have an appropriate and sufficient remedy in equity.

A justice is empowered, in some states, to determine cases of accounts. In such instances, the question whether the amount in controversy be small enough to fall within the justice's authority or not is ascertained from the actual amount due or unpaid. The jurisdiction may be determined by the sum claimed by both plaintiff and defendant. If the total of these amounts be greater than the amount named as the limit of the justice's authority he has no power to try the case. This is the rule in New York.<sup>59</sup>

**17. Jurisdiction in Actions of Tort.**—Besides the jurisdiction conferred upon a justice in respect of contracts or actions arising therefrom, he is very generally empowered in the United States to take cognizance of cases of tort, where the damages recoverable are limited in amount. The jurisdiction is further limited as to the subject-matter, injuries to personal property being the only subject within the scope of his authority. In Alabama, for example, the jurisdiction is limited to claims of fifty dollars or less; in Arkansas, to a

<sup>57</sup> 105 Ga. 252 (1898); 24 W. Va. 399 (1884).

<sup>58</sup> 7 Ark. 165 (1846); 123 N. C. 51 (1898); 15

<sup>59</sup> 58 Mo. 499 (1875); 85 N. C. 138 (1881); 10

How. Pr. (N. Y.) 250 (1857).

S. & R. (Pa.) 227 (1823).

claim of one hundred dollars or less.<sup>60</sup> Jurisdiction is conferred also, in some states, in actions for redress of personal injuries arising from negligence or other wrongful act.

A justice of the peace has no power, in some states, to try actions for damages arising from assault and battery, false imprisonment, libel and slander, criminal conversation, seduction, or malicious prosecution.<sup>61</sup> Actions of forcible entry and detainer are usually within a justice's cognizance, but the constitutions of some of the states contain provisions expressly depriving him of such jurisdiction. Others contain clauses inconsistent with its existence. Where the jurisdiction does exist, it may be original and exclusive, or it may be concurrent with that of other courts.<sup>62</sup> The power to try cases of replevin is also dependent on statutes which define the amount to which his cognizance extends and the relation of such jurisdiction to that of other courts.<sup>63</sup>

Where a question as to the right of property arises in cases of attachment, garnishment, or replevin, in such states as give a justice of the peace jurisdiction over such matters, the justice may determine the issue of the right to the property irrespective of its value.<sup>64</sup> Damages to real property rarely form the subject of actions that can be brought before justices of the peace, irrespective of whether the amount involved be within that usually conceded to be within the jurisdiction of the justice. This is equally true of actions for trespass upon real property.<sup>65</sup> Like rules exist with respect to actions involving title to real estate. This is usually the subject of a special clause excepting such actions from the jurisdiction of the justice. Where the question is one of possession merely, in which that of title is not involved, the jurisdiction, as a rule, exists. So, too, with actions for forcible entry and detainer.<sup>66</sup> In states

<sup>60</sup> 87 Ala. 370 (1880); 42 Ark. 210 (1883).

<sup>61</sup> 58 Hun (N. Y.) 607 (1890); 34 Neb. 100 (1892).

<sup>62</sup> 92 Ala. 591 (1890); 67 Ill. 446 (1893); 44 Neb. 829 (1895); 32 Wis. 518 (1873); 4 Ark. 147 (1841).

<sup>63</sup> 115 Mich. 363 (1897); 88 Wis. 216 (1875).

<sup>64</sup> 77 Mo. App. 304 (1898).

<sup>65</sup> 142 Ill. 534 (1892).

<sup>66</sup> 133 Ind. 488 (1892); 105 Mich. 229 (1895); 116 N. C. 460 (1895); 15 Gratt. (Va.) 528 (1860); 38 Cal. 683 (1869); 147 Ill. 335 (1893).



where chattel mortgages exist, the question of the justice's jurisdiction is determined sometimes by the value of the property, sometimes by the amount claimed.<sup>67</sup>

In some states, statutes expressly direct that a justice shall not have cognizance of actions on contracts for the sale of real estate. Irrespective of the amount in such jurisdictions, no part of such a contract can form the basis of an action in a justice's court. The purpose of such restrictions is to remove absolutely from the justice's jurisdiction cases where the title to real estate is in controversy. On an ordinary contract for the sale of real estate, however, a justice can, as a rule, determine an action for the balance of purchase money, provided the amount claimed be within the amount of which he is entitled to take cognizance. Where an issue of title is raised, the justice loses jurisdiction.<sup>68</sup>

Actions upon lost instruments fall within the sphere of a justice's jurisdiction, and those steps incident to such procedure, such as the requirement of indemnity, are properly exercised by him. There are, however, states in which a justice may not, in such cases, require indemnity.<sup>69</sup>

No authority is given a justice, as a rule, to determine proceedings in arbitration and award. Nor can he, unless specially empowered to do so, enter judgment on an award.<sup>70</sup> His jurisdiction in cases of attachment is determined by the amount in controversy. The question is entirely a matter of statutory regulation.

18. As a rule, a justice has jurisdiction to try the cases brought before him, and to render and enforce judgment, but, in some states, his power in this respect is limited. In many jurisdictions, the proceedings before a justice, alderman, or magistrate are *ex parte*, that is, the sworn statement of the plaintiff, persisted in, imposes upon the justice or magistrate the obligation of giving judgment for him, irrespective of the matters of defense presented by the opponent. The term *ex parte* implies an examination in the presence of

<sup>67</sup> 77 Tex. 32 (1890).

<sup>68</sup> 66 Cal. 636 (1872).

<sup>69</sup> 3 Harr. (Del.) 427 (1843).

<sup>70</sup> 39 Ind. 330 (1872).

one of the parties and absence of the other, but it is also used to designate proceedings where judgment is given upon the application of one of the parties only. If A sue B before a magistrate for a debt of one hundred dollars, and swear to the existence of the debt, the magistrate has no recourse but to give him judgment, where the proceedings are *ex parte*. In such cases the defendant, if he feel himself aggrieved, has the right of appeal.

Defenses interposed to the plaintiff's demand by way of set off or counter claim are regulated by statute. The justice has jurisdiction to entertain such defenses in most of the states, either by direct legislation or by clauses in the code of procedure. Generally, the following principles are applicable to such defenses: The amount claimed by way of set off must be within the amount of which the justice is allowed to entertain jurisdiction. If it be greater, the plaintiff must have judgment.<sup>71</sup> Where it happens that the amount claimed by the defendant by way of set off is too great to be entertained by the justice as a defense, the defendant is permitted, on appeal to a higher court, to interpose such a defense;<sup>72</sup> but, in some states, the justice has power to enter judgment in favor of the defendant for the amount by which his set off exceeds the demand of the plaintiff.<sup>73</sup> Where the jurisdiction in civil cases is conferred by naming the actions, as debt and assumpsit, other actions not named are thus excluded.<sup>74</sup>

**19. Jurisdiction in Equity.**—There is no general equity jurisdiction residing in a justice of the peace, except where a statute has conferred the power. In some of the commonwealths of the United States, the distinction between actions at law and actions in equity has been abolished. But, even in such states, it is generally held that a justice of the peace has no equity powers.<sup>75</sup> For this reason causes which are the especial province of courts

<sup>71</sup> 110 Cal. 259 (1896); 37 Pa. 456 (1860).

<sup>72</sup> 17 S. & R. (Pa.) 386 (1828).

<sup>73</sup> 28 Conn. 115 (1859); 39 Mo. App. 465 (1889); 10 Johns. (N. Y.) 110 (1813).

<sup>74</sup> 13 Ill. App. 60 (1883).

<sup>75</sup> 28 Mo. 400 (1859); 8 Baxt. (Tenn.) 85 (1874).

of equity, such as actions for specific performance of a contract, to set aside a fraudulent conveyance, and the like, cannot be brought before a justice of the peace. It is permitted them, however, in deciding cases, to make use of the maxims and principles of equity in reaching a conclusion. But, if a defendant interpose a defense which can be properly entertained only by a court of equity, the justice loses jurisdiction.<sup>76</sup> However, in certain states, equitable powers have been conferred upon justices, but they are limited, in such cases, to those powers actually conferred by the statute and do not include the general jurisdiction of a court of equity.<sup>77</sup>

Ordinarily, justices have no jurisdiction over cases to recover taxes and like matters, such as special assessments.<sup>78</sup> Actions for accounting are properly subjects of equitable jurisdiction, and a justice, therefore, has no cognizance of such cases. The same rule holds regarding the enforcement of liens against real or personal property. This is a subject of equitable jurisdiction, and the justice, in the absence of a statute, can exercise no jurisdiction over such a case. Jurisdiction cannot be implied from a statute conferring general powers in all cases involving a certain amount or under; statutes exist conferring jurisdiction in such cases. A like rule prevails concerning mechanics' liens.<sup>79</sup>

**20. Jurisdiction in Criminal Proceedings.**—As has been stated, the powers of justices, or rather, conservators of the peace, formerly in England, were purely ministerial. Their commissions authorized them to hear and determine felonies and breaches of the king's peace. The commission further enumerated the offenses over which they were to exercise jurisdiction.<sup>80</sup>

The jurisdiction of justices of the peace in the United States, so far as it relates to offenses of a graver nature—felonies and the like—extends only to a preliminary examination and to fixing the bail in offenses where bail may be

<sup>76</sup> 124 N. C. 163 (1841); 31 Minn. 392 (1883).

<sup>77</sup> 98 Tenn. 599 (1896); 22 Tex. 611 (1858).

<sup>78</sup> 97 Mo. 571 (1888).

<sup>79</sup> 52 Ill. 334 (1860); 106 N. C. 427 (1889); 59

Tex. 450 (1883); 95 Mich. 5 (1893); 99

Ala. 259 (1892).

<sup>80</sup> Bac. Abr. Tit. Justices of the Peace.

accepted. He has no common-law jurisdiction; whatever power he possesses over criminal actions he owes to statutes.<sup>81</sup> In Massachusetts, the English statutes conferring jurisdiction on justices of the peace were adopted as part of the common law.<sup>82</sup> The state constitutions, in other states, regulate the criminal powers of justices of the peace. In some states, justices have also a common-law jurisdiction as conservators of the peace and as committing magistrates. Where the jurisdiction depends entirely on statute or on a constitution, the courts hold strictly to the letter of the law. There is no implication of jurisdiction.<sup>83</sup> It is not permitted a justice to try felonies and offenses punishable by a term in the penitentiary, but he is generally empowered to hold the preliminary examination in criminal cases of whatever nature, and to commit to prison in default of bail, or to require bail, for the prisoner's appearance at the next term of court.

**21.** The restriction which forbids a justice to take cognizance of actions where the title to real estate is involved does not apply to criminal prosecutions, and the fact that incidentally such a question does arise in a criminal action is immaterial to the justice's jurisdiction.<sup>84</sup> But, in Minnesota, the contrary rule holds. A question of title to real estate, raised in any kind of action, will deprive a justice of jurisdiction.<sup>85</sup> In determining whether a justice have jurisdiction or not, it is customary to follow the offense charged in the complaint and not the facts disclosed at the trial. The facts which control the jurisdiction of a justice are those shown at the beginning of the action. With respect to punishment by fine, the limit placed upon a justice is one of amount. This may carry the costs as well. Where the punishment is one of imprisonment, a justice's jurisdiction is limited to a certain period of incarceration. No limit as to the penalty exists in some jurisdictions.<sup>86</sup>

<sup>81</sup> 25 La. Ann. 42, 46 (1873).

<sup>82</sup> 1 Mass. 59 (1823).

<sup>83</sup> 80 Ala. 8 (1886); 11 Pa. Co. Ct. 272 (1891).

<sup>84</sup> 72 Ind. 421 (1882).

<sup>85</sup> 33 Minn. 23 (1885).

<sup>86</sup> 49 N. H. 483 (1870); 40 Tex. 472 (1874); 31 Ill. 88 (1863); 67 Mich. 475 (1888); 49 N. H. 498 (1870); 14 S. C. 400 (1880); 1 Wyo. 67 (1875).

The power to award fines and extra penalties is, in some states, granted to justices of the peace.<sup>87</sup> Offenses punishable by fine and imprisonment do not come within a justice's jurisdiction in states where he has power only to impose fines. He may, however, in the case of a fine, imprison the person fined until it is paid.<sup>88</sup> Furthermore, if a justice's cognizance extend to cases of fines of a certain amount or to cases of imprisonment for a certain time, he is not empowered to adjudicate cases punishable under the statute by fine or imprisonment, or both, at the discretion of the court; but a contrary rule obtains in some jurisdictions.<sup>89</sup>

The early stages of bastardy proceedings may be brought before a justice of the peace, who may, as a rule, hold the defendant or place him under bonds for appearance at trial. In some states, such powers are entrusted entirely to municipal or police courts, and, in those states, justices of the peace have no such authority.<sup>90</sup>

The power to issue warrants to police and other officers for the arrest of offenders resides in justices of the peace—a power common to all peace officers. Where emergency necessitates such a course, a justice of the peace has authority to appoint a special constable; also, where no constable can be secured. The statutes generally enumerate the cases in which it is proper for the justice to make the appointment, but leave to the justice the judgment of its necessity.<sup>91</sup> It has been held, however, that a justice cannot compel a private individual to execute his processes.<sup>92</sup>

A justice may punish for contempt of court, in the majority of the states, but in a few states this power is denied him.<sup>93</sup>

**22. Jurisdiction Under Special Laws.**—As incidental to the office of justice of the peace, there are numerous other duties imposed by statute. These include such duties

<sup>87</sup> 54 Ark. 364 (1891).

<sup>91</sup> 24 Ala. 672 (1854).

<sup>88</sup> 78 Ind. 139 (1881); 35 Tex. Crim. Rep. 410 (1896).

<sup>92</sup> 1 Ashm. (Pa.) 183 (1831); 1 Ill. 187 (1844).

<sup>89</sup> 36 Neb. 287 (1883); 14 Gray (Mass.) 35 (1859).

<sup>93</sup> 113 Ala. 323 (1897).

<sup>90</sup> 117 N. C. 780 (1895); 20 Md. 277 (1863); 74 Ga. 842 (1884); 26 Me. 378 (1846); 6 Pick. (Mass.) 104 (1838); 73 Mich. 637 (1889); 62 N. H. 61 (1882).



as the opening and care of highways, appointment of appraisers, control of overseers of the poor, and the like. In some states, abatement of a nuisance is the subject of a justice's jurisdiction.<sup>94</sup> In some states, in the absence of the coroner, the duties of the office devolve upon a justice of the peace. This includes the event of the absence of the coroner from any cause, and the justice who performs his duty in such a case is entitled to the fees of the office.<sup>95</sup>

The jurisdiction of justices of the peace under special laws includes the solemnization of marriages, in some states; also, the acknowledgment of conveyances, the protest of commercial paper, and other duties of a notary public.

### JURISDICTION UNDER FEDERAL LAWS

**23. Suits for Debts.**—The United States may sue, either in the name of the United States or in the name of an authorized officer, before any state magistrate, for the recovery of debts, in all cases where the acts of congress do not vest an exclusive jurisdiction in the federal courts. Such suits, however, both in their nature and their amount, must be within the jurisdiction of the state magistrate, according to the laws of that state providing for suits instituted by private persons. The process for commencing, prosecuting, and terminating suits of the United States is the same as in suits between individuals.

**24. Suits for Penalties and Forfeitures.**—The judiciary act of 1789 confers on the United States courts original cognizance of all seizures on land or water and of suits for penalties and forfeitures incurred under the laws of the United States. Under subsequent acts of congress, state magistrates and state courts have jurisdiction for the recovery of particular penalties and forfeitures. State magistrates having received due information of offenses or of goods concealed in violation of the laws of the United States, may

<sup>94</sup> 60 Ga. 266 (1878); 2 Kans. App. 13 (1896).

<sup>95</sup> 46 Ind. 541 (1874); 40 N. J. Law 159 (1878).

lawfully issue warrants of arrest and search warrants, as in similar cases occurring under the state laws. Upon examination of the cases, if it be found to be within the state magistrate's jurisdiction, he will proceed to decide them; if not, he will refer the cases to the competent judge or tribunal.

The process in cases of penalty is the same as in actions of debt, for money due. The process in cases of forfeiture of goods is an information *in rem*—against the thing itself. In both kinds of cases, the cause of the action should be in the express terms of the act of congress, and the declaration or information should state that the same occurred “contrary to the form of the act of congress in such cases made and provided.”

**25. Criminal Prosecution.**—For any crime or offense against the United States, the offender may be arrested, imprisoned, or bailed by any justice of the peace or other state magistrate; but where the punishment may be death, bail can only be admitted by a United States court or by a justice thereof. If, however, a person committed by a justice of the supreme, circuit, or district court of the United States, for an offense not punishable with death, shall afterwards procure bail, and there be no federal judge in the district to take the same, it may be taken by any judge of the supreme or superior court of the state.

The usual form of process against offenders in the state is to be issued, and at the expense of the United States. If the crime, or offense charged, be not capital, the state magistrate, when the offender is brought before him, may imprison or admit him to bail for trial before such court of the United States, or of the state, as have cognizance of the offense. Where the punishment of the offense may be death, the state magistrate cannot admit the offender to bail, but must commit him for trial, or until discharged by the due course of law.

In cases bailable by a state magistrate, he must take a recognizance from the offender and his sureties in a form similar to that adopted in cases arising under the state laws.

He must also take the recognizances of the witnesses for their appearance to testify in the case, which may be required on pain of imprisonment. The accused has a right to the same process to compel the attendance of the witnesses on his behalf. The magistrate must return as speedily as possible to the clerk's office of the court having cognizance of the offense, copies of the process, together with the original recognizances taken from the party accused.

**26. Proceedings for Desertion and Seamen's Wages.**—In case any seaman who shall have signed a contract to perform a voyage shall at any port or place desert or absent himself from his vessel without leave of the master or commanding officer, justices of the peace are empowered by the act of congress to issue a warrant to apprehend such deserter and bring him before them; and, if the complaint of the master shall be sustained, to commit such seaman to jail, there to remain until the vessel be ready to proceed on her voyage, or the master require his discharge, and then to be delivered to the master, on payment of the costs, which are to be deducted from the seaman's wages. The justice's jurisdiction is merely concurrent; the master's authority under the general maritime law is not superseded. Justices are also empowered, on the application in writing of a consul or vice-consul of any foreign government having a treaty with the United States for the restoration of seamen deserting, to issue process for the arrest and examination of any seaman who may have deserted from a vessel of such government, and, if the complaint be sustained, such deserter, not being a citizen of the United States, is to be delivered up to such consul or vice-consul to be sent back to the dominions of such government, or, on the request and at the expense of the said consul or vice-consul, he shall be detained until the consul or vice-consul finds an opportunity of sending him back, not exceeding two months.

Justices of the peace are also authorized to summon the master of a vessel to show cause why process should not issue out of the admiralty court for wages due to the seaman

of a vessel and to grant a certificate thereof to the clerk of the district court. In an action for seamen's wages, a certificate issued by a justice of the peace must show on its face that the justice has authority to act.

The territorial jurisdiction of a justice of the peace is not extended by the laws of the United States which give him the above powers. He cannot issue process against persons residing without his state, or, in fact, against any one beyond his statutory jurisdiction.

### POWERS AS PEACE OFFICER

**27.** Justices are *ex officio* conservators of the peace and are given power by statute to prevent breaches of the peace, to suppress them when they occur, and to apprehend the offenders and to bring them to justice.<sup>96</sup> In this regard, a justice of the peace has the same rights and powers as any other peace officer, and may arrest one whom he has just cause to suspect of a felony,<sup>97</sup> or one committing a breach of the peace in his presence;<sup>98</sup> but the justice's usual course is to issue his warrant to a constable, or other officer, instead of making the arrest himself.<sup>99</sup>

To prevent breaches of the peace, the commission, in the language of the English law, directs the justices "to cause to come before you, or any of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace or their good behavior, toward us and our people; and if they shall refuse to find such security, to cause to be safely kept."<sup>100</sup> Thus, a justice of the peace is authorized to take *surety of the peace*, and to take *surety for good behavior*.

**28. Surety of the Peace.**—A breach of the peace is a violation of public order; the offense of disturbing the public peace; an act of public indecorum. Persons who go out on a strike, and linger about the place of their former

<sup>96</sup> Maxw. Duties of Justices, p. 65.

<sup>97</sup> 8 Conn. 375 (1831).

<sup>98</sup> 1 Yeates (Pa.) 419 (1795).

<sup>99</sup> Bish. New Cr. Proc., Sec. 77.

<sup>100</sup> Stats. 2 Edw. III, c. 16; 34 Edw. III, c. 1.

employment, hooting at others taking their places, may be bound over to keep the peace.<sup>101</sup> Besides actual breaches of the peace, anything that tends to provoke or excite others to break the peace is an offense of the same denomination. Therefore challenges to fight, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offense.<sup>102</sup>

To take surety of the peace means to require a person to bind himself, and, when expedient, to procure others also to bind themselves as sureties for him, in a penal bond, or recognizance, that he will keep the peace for a certain time toward the sovereign (in England), toward all his subjects in general, and in particular, toward the person who appears peculiarly to require this protection. In the United States, the bond is to the state. A justice of the peace or magistrate may, at his discretion, and without any application from any other person, although usually founded upon proof of the necessity, bind to keep the peace all persons who in his presence make an affray or threaten a breach of the peace, or contend with hot words, so as to give reasonable apprehension that a breach of the peace will follow, or go about armed with unusual weapons and armed attendants, or are brought before him for a breach of the peace, or are convicted of having forfeited former recognizances to keep the peace. This proceeding is in harmony with the means for preventing the commission of crimes and misdemeanors. Preventive justice is, upon every principle of reason, of humanity, and of sound policy, preferable in all respects to punishing justice, the execution of which, though necessary, and in its consequences, a species of mercy to the commonwealth, is always attended with many harsh and disagreeable circumstances.<sup>103</sup> The taking of the surety is regulated by statute. Although, as stated, it may be at the magistrate's own discretion, it is considered by many authorities to require a formal complaint in writing and upon oath, to justify the justice in issuing a warrant against the party

<sup>101</sup> Bouv. Law Dict.; 11 Pa. Co. Ct. 481  
(1892).

<sup>102</sup> 4 Black. Comm. 150.

<sup>103</sup> 4 Black. Comm. 251.



complained of.<sup>104</sup> In the United States, the proceeding may be brought in the name of the state without any relator,<sup>105</sup> and the justice can only require the accused to find sureties of the peace until the next court.<sup>106</sup> In England, the obligation is to the king, and the recognizance is usually certified to the next sessions, though it may be required for a limited time, according to the justice's discretion. If the condition of the recognizance be broken by any breach of the peace, the recognizance becomes forfeited or absolute, and the parties and his sureties will be subject to suit for the sums in which they are bound.<sup>107</sup>

**29. Recognizance for Good Behavior.**—What has been said concerning recognizance for the peace is applicable to recognizance with sureties for good behavior. The latter includes security for the peace, and somewhat more.<sup>108</sup>

The English statute authorizes justices "to bind over to the good behavior towards the king and his people all them *that be not of good fame*, wherever they be found; to the extent that the people be not troubled nor endangered, nor the peace diminished, nor merchants and others, passing by the highways of the realm, be disturbed nor put in the peril which may happen by such offenders."<sup>109</sup> Under the expression "that be not of good fame," it is held that a man may be bound to his good behavior for causes of scandal, against good morals, as well as against peace; as, for haunting bawdyhouses with women of bad fame, or for keeping such women in his own house; or for words tending to scandalize the government; or in abuse of the officers of justice, especially in the execution of their office. Thus, also, a justice may bind over all night walkers, eavesdroppers, reputed pilferers or robbers, common drunkards, and vagabonds.<sup>110</sup>

A recognizance for good behavior may be forfeited by the same means as one for surety of the peace, and also by some others, as, by going armed with unusual attendants, to the

<sup>104</sup> 23 Wend. (N. Y.) 638 (1840).

<sup>105</sup> 66 Ind. 72 (1879).

<sup>106</sup> 8 Mass. 78 (1811).

<sup>107</sup> 4 Black. Comm. 253; 4 B. & Ald. (Eng.) 487 (1821).

<sup>108</sup> 4 Black. Comm. 256.

<sup>109</sup> *Ibid.*, citing Stat. 34 Edw. III, c. 1.

<sup>110</sup> *Ibid.*, p. 256.

terror of the people; by speaking words tending to sedition; or by committing any of the acts of misbehavior which the recognizance was intended to prevent, but not by giving fresh cause of suspicion of that which may never actually happen."<sup>111</sup>

In the United States, it is judicially declared that surety for good behavior "is either required after conviction for some indictable offense, in which case it forms part of the judgment of the court, and is founded upon a power incident to courts of record by the common law, or it is demanded by judges or justices of the peace out of court, before the trial of a person charged with an offense in pursuance of authority derived from a statute, made the 34th year of Edward III. . . . The natural meaning of the words 'persons not of good fame' seems to be those who by their general evil course and habits of life had acquired a bad reputation, and were supposed to be dangerous to the community. In process of time, however, the construction of these expressions has been extended far beyond their original meaning, and persons are now commonly held to find surety for good behavior who are not generally of ill fame, but have only been charged with some particular offense. . . . The most that can be said with regard to recognizances for good behavior is that they are demandable or not at the discretion of the judge. They differ from recognizances to keep the peace in two important features: (1) Surety for good behavior is more extensive in its nature than surety for the peace, and may be more easily forfeited and therefore should be exacted with great caution. (2) Surety of the peace is demandable of right by any individual who thinks himself in danger of bodily hurt, and will make the necessary oaths; but that principle has not been applied to surety for good behavior. . . . It will be most agreeable to the spirit of our constitution . . . to adopt it as a rule, not to demand surety for good behavior before conviction."<sup>112</sup>

<sup>111</sup> 4 Black. Comm., p. 257.

<sup>112</sup> 1 Binn. (Pa.) 101 (1804), citing *Comth. v. Duane*, by Tilghman, C. J.; 3 Phila. 509 (1859).

## LIABILITY

**30.** A justice of the peace is liable for wrongful performance or non-performance of his ministerial acts. A party wronged or injured by any such misconduct in office on the part of the justice may bring an action for damages against the wrong-doer.<sup>113</sup> He is not by law entitled to the services of a clerk, and the duties of clerk of his own court devolve upon him. Refusal to perform such duties to the prejudice of any one will make him liable in damages to the party injured.<sup>114</sup> Unless specially provided, a justice is allowed nothing for compensation of a clerk;<sup>115</sup> nor is he allowed for office furniture, stationery, and the like.<sup>116</sup>

It is only for ministerial acts that a justice can be held liable; for judicial acts he is not responsible. This rule is uniform in England and in the United States.<sup>117</sup> Judicial acts are those which are to be done or not, as the judgment of the person required to do it dictates; they are such as are usually performed by a judge of a court. Ministerial acts are those which the law requires to be done, without reference to the judgment of the person required to do it, when certain circumstances exist; they are such as are of a clerical nature—similar to the official acts of a clerk of a court. The former are discretionary; the latter, imperative. An act is not the less ministerial because it requires the exercise of judgment in the preliminary task of determining whether all the facts exist which are the necessary basis of the ministerial act required to be done. To make an order or to adjudicate upon the guilt or innocence of an accused person, is a judicial act, depending altogether on the view which the magistrate in the exercise of his judgment takes

<sup>113</sup> 119 Ala. 518 (1898).

<sup>114</sup> 64 Vt. 203 (1892); 22 Ohio St. 317 (1872).

<sup>115</sup> 9 Colo. App. 161 (1897).

<sup>116</sup> 166 Mass. 303 (1895).

<sup>117</sup> 3 B. & C. (Eng.) 649 (1824); 66 Ga. 228 (1881); 65 Ind. 106 (1879); 107 Mass. 118 (1871).

of the law and the facts of the case. But the mere entering upon the inquiry is ministerial; the law casts on him the duty of holding it; the discharge of that duty is, in fact, initiatory to the judicial proceeding, and the magistrate has no discretion to exercise as to whether he shall hold it or not.<sup>118</sup> So, where an act deprives a successful plaintiff of costs, unless the judge certify that the case falls within a certain class, the grant or refusal of the certificate is a judicial act, for it rests entirely in the judge's discretion, turning on the view which he may take of a question of law or fact.<sup>119</sup> But when an act provides that if justices dismiss a complaint they shall grant a certificate of the dismissal to the applicant for it, the grant of it is a purely ministerial act, which it is imperative on them to perform as soon as it appears that the complaint was in fact dismissed.<sup>120</sup>

For judicial acts, whether right or wrong, no action can be brought against a justice of the peace. The only question that can be raised in respect of judicial acts is that of jurisdiction of the parties, or of the subject of controversy. Where he acts fraudulently or maliciously, there exists a remedy by impeachment or by indictment for misconduct in office.<sup>121</sup> Mistakes as to jurisdiction will, in general, render a justice liable.<sup>122</sup> This exception to the general rule that a justice cannot be held liable for judicial acts has in some cases been challenged, as this class of judicial errors as well as any other can be corrected by appealing to a higher court.<sup>123</sup> Where the question of jurisdiction of the justice is dependent on the existence of certain facts, before the justice can be held liable for a mistake as to jurisdiction, it must appear that he was acquainted with such facts.

Where the justice makes error of law, or commits mistakes in the course of a case trying before him, the party injured may obtain redress by appealing the case to a higher court, where such errors may be corrected. This is, in general,

<sup>118</sup> 9 Cl. & F. (Eng.) 251, 263, 313 (1842).

<sup>119</sup> L. R. 3 C. P. (Eng.) 607 (1868).

<sup>120</sup> Maxw. Duties of Magistrates, p. 5.

<sup>121</sup> 33 N. J. Law 134 (1868); 33 Ohio St. 186 (1877).

<sup>122</sup> 20 La. Ann. 444 (1868).

<sup>123</sup> 106 Iowa 131 (1898).

true where judgment has been given to an amount beyond the jurisdiction of the justice, or in overtaxing costs, and the like.<sup>124</sup> In the case of an act of mixed nature, such as approval of sureties on a bond where the exercise of considerable discretion is demanded, the justice is not liable for errors made in accepting or rejecting sureties unless it can be shown that he acted corruptly or maliciously.<sup>125</sup>

**31.** The conditions of the bond filed by the justice are that he faithfully discharge the duties of his office and pay over on demand all moneys received while in office. This applies only to ministerial duties. Upon this bond the sureties are liable for any misconduct in office so far as it relates to his ministerial duties. Where, however, the justice has appropriated moneys which he was unauthorized by statute to receive, the sureties cannot be held liable, as the bond covers only official acts.<sup>126</sup> This is also true where the justice does acts not included in his jurisdiction; or, where a justice has collected money on a judgment void for want of jurisdiction; or, where in the excess of his jurisdiction he has committed a person to prison, and thus become liable for false imprisonment.<sup>127</sup> The bond filed by the surety generally makes him liable for the entire term of the justice. Statutes, in some jurisdictions, permit the surety to serve notice of his refusal to continue as surety, whereupon a new bond containing the same conditions as the old must be filed and accepted by the proper authorities.<sup>128</sup>

The acts of a justice of the peace, if illegal and of a grave nature, may subject him to liability criminally. In England, and in some parts of the United States, a corrupt or dishonest motive is necessary to make him liable criminally. These rules apply also to a *de facto* justice of the peace.<sup>129</sup> Failure to suppress a riot has been made the subject of a criminal information lodged against a justice of the peace.<sup>130</sup>

<sup>124</sup> 16 N. J. Law 473 (1838); 17 Johns. (N. Y.) 145 (1820); 37 La. Ann. 477 (1885).

<sup>125</sup> 76 Mo. App. 8 (1882).

<sup>126</sup> 70 Md. 586 (1889); 2 Black. (Ind.) 135 (1829); 10 Neb. 484 (1880).

<sup>127</sup> 8 Pa. 145 (1848); 36 Ind. 111 (1871).

<sup>128</sup> 19 Ohio St. 485 (1869).

<sup>129</sup> 75 N. C. 442 (1876); 3 B. & Ald. (Eng.) 432 (1819); 47 Me. 462 (1859).

<sup>130</sup> 1 Yeates (Pa.) 370 (1793).



## GENERAL PROVISIONS

**32. Absence of the Justice.**—In the event of the absence of a justice of the peace for any cause, the nearest justice is usually substituted to act with authority to try cases. The statutes enumerate the instances in which it is permitted to substitute another justice.<sup>131</sup>

**33. Fees of Office.**—Justices of the peace and allied officers are compensated in various jurisdictions by fees or by salaries; in some states, they receive both. Every fee taken is defined and regulated by statute, and the services of which no mention is made must be performed without compensation. The laws which govern the fees differ in the various jurisdictions; no rules can be given by which to ascertain the fees in any given territory; it is necessary to consult the statutes of each state or country.<sup>132</sup> Fees for ministerial acts may be demanded, and are payable, in advance; fees in an action trying before a justice generally abide the decision and are collectable with other costs of the case. A justice is not deprived of the right to sue for fees where he has not demanded payment in advance, and he is permitted to tax such fees as costs and issue an execution for them.<sup>133</sup>

**34. Vacancy in Office.**—A vacancy in the office of justice of the peace may occur in any one of the following ways: (1) By neglect to qualify, that is, to comply with the statutory requisites when the office has no incumbent; (2) by a change in the boundary line of the district for which the justice has been chosen; (3) by abandonment of the office; (4) by removal from the district for which he has been chosen; (5) by resignation; (6) by removal from office; (7) by death; (8) by acceptance of some incompatible

<sup>131</sup> 90 Ala. 480 (1867); 30 Ohio 480 (1876).

<sup>133</sup> 32 N. Y. App. Div. 274 (1896).

<sup>132</sup> 121 Cal. 482 (1898); 131 Ill. 185 (1890); 37 Ill. App. 641 (1886); 166 Mass. 303 (1896).

office. Absence, temporarily, from the state does not vacate the office. In such event, as before stated, the duties of the office fall upon the nearest justice. Vacancies are generally filled in the United States by appointment by the governor of the state. County commissioners are, in some jurisdictions, empowered by statute to fill vacancies, in which case the governor has no power of appointment.

**35. Removal From Office.**—Where the office is elective, a justice of the peace cannot be removed from the office except for cause, such as that he has been guilty of some offense. Where the offense amounts to a serious crime, a felony or the like, conviction thereof is in itself sufficient cause for removal. Other causes are malfeasance in office, malpractice, extortion, drunkenness, and accepting another office incompatible with the office of justice.<sup>134</sup> Where the office is appointive, the officer empowered to appoint is likewise empowered to remove.<sup>135</sup>

**36. Justice's Docket.**—The essential idea of a modern docket is an entry, in brief, in a proper book of all the important acts done in court in the conduct of each case, from its commencement to its conclusion. *Docket*, in common use, is the name given to the book containing these abstracts. Statutes in most of the United States provide that every justice of the peace shall keep a docket in which he shall enter the title to all causes commenced before him, the date of the issue of first process and when the parties appeared before him, a brief statement of the plaintiff's demand and all data relative to the proceedings in each cause, including the rendering of judgment and issuing of execution, if any, the name of the officer or officers to whom delivered, and the fact of an appeal having been made and allowed, with the date of making the appeal and allowance.<sup>136</sup>

It is necessary that the justice keep the proceedings had before him in some way so that the rights and remedies of the parties appearing before him may be protected after

<sup>134</sup> 38 Tex. 548 (1873); 36 N. J. Law 125 (1873); 21 N. Y. Supp. 351 (1892).

<sup>135</sup> 6 Mackey (D. C.) 47 (1887).

<sup>136</sup> Mo. Rev. Stats., 1879, Sec. 2.844.

they have been determined by him. While the statutes require the justice to make entries in his docket, the omission to make these entries is not fatal to jurisdiction; the proceedings may be proved by himself. However, the various entries are *quasi* records, and the best evidence of the proceedings; hence, it is necessary that the docket should be well kept. In nearly all of the states, jurisdiction of the justice's court must appear on the record kept of its action. When it can be ascertained from the docket that the justice has in substance carried out the requirements of the law, a mere technical defect or informality will not be held sufficient to vitiate the proceedings.<sup>137</sup>

In case of a justice's resignation or removal from office, or removal from his proper district, it is made the duty of the justice, prescribed by statute, and of his legal representatives, in case of the death of the justice, to deliver to some neighboring justice his docket, together with all notes, bonds, and other papers in his possession, concerning any judgment or suit entered thereon.<sup>138</sup> In case of the temporary absence of a justice, no other justice can issue execution on a judgment rendered by him, unless the docket be deposited with such justice; such execution would be void, and the constable acting under it a trespasser.<sup>139</sup>

**37. Justice's Transcript.**—A justice's transcript is a copy or exemplification of the formal record of proceedings as made up in the justice's docket; to be full and complete, it should contain all the original proceedings that have been recorded in the docket, as required by law.<sup>140</sup> The transcript of a judgment entered by a justice in a cause is necessary to perfect an appeal. Statutes prescribe that it is the duty of a justice to certify and deliver to the appellant a transcript of the proceedings of a cause adjudicated before him, but, before doing so, the justice, in some states, is entitled

<sup>137</sup> Am. & Eng. Encyc. Law (1st. Ed.), Vol. 12, pp. 502, 503, 504, citing 52 Barb. (N. Y.) 188 (1868); Abb. Trial Ev. 540; 126 Mass. 235 (1879); 3 Kans. 231 (1865).

<sup>138</sup> Pa. P. L., 1833, p. 12, Sec. 1.

<sup>139</sup> 2 Phila. 284 (1856).

<sup>140</sup> 21 Ohio St. 357 (1871); 15 Kans. 383 (1875).

to demand and receive from the appellant the costs in the case. The law requires the prothonotaries or clerks of the respective courts to enter such transcripts on their dockets, without the agency of an attorney.<sup>141</sup> It is also a statutory duty of a justice, in some states, to certify and deliver to any person demanding the same the transcript of a judgment obtained before the justice, for the purpose of entry on the docket of the prothonotary of the proper county so as to bind the real estate of the party or parties against whom the judgment has been rendered. When entered in the clerk's office of the proper court, such transcript assumes the force and effect of a judgment originally obtained in such court.<sup>142</sup>

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<sup>141</sup> Pa. P. L., 1885, p. 159, Sec. 1.

<sup>142</sup> *Ibid.*, p. 160.





# THE LAW OF PATENTS, COPYRIGHT, AND TRADE-MARKS

(PART 1)

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## INTRODUCTION

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### SCOPE OF TITLE

1. It is essayed here to treat of those peculiar personal rights, mentioned previously as a class of incorporeal personal property, which are usually only brought into notice by the necessity of protecting them from wrongful interference.<sup>1</sup> These rights are the exclusive privileges secured, according to certain legal forms, to inventors or discoverers of new and useful arts, authors of literary or artistic productions, and the makers and designers of symbols, devices, or emblems by which the wares of tradesmen are identified and known to the trade, all of which are comprised in the terms *patents*, *copyright*, and *trade-marks*. Included in the latter are *trade-names*, which comprise a species of property of the same nature as trade-marks, and which are protected in a like manner.<sup>2</sup>

That these creations of the individual brain very properly form a class of incorporeal personal property—a third class, although partaking of the nature of the others, as placed in the arrangement of this Course—is fully explained in our general treatment of property. A man's *own* is property; his labor is property. So, the emanation of his brain,

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<sup>1</sup> See *The Law of Property: Personal Property, Incorporeal Personal Property*.

<sup>2</sup> 33 Am. Rep. 328-335 (1878).

*For notice of copyright, see page immediately following the title page.*

individual thought, manifested in a material thing, is property. The best proof of this is the very existence of individual thought, whether made to become a reality in the form of an invention or discovery, a literary production, or in something that symbolizes or marks the origin and ownership of a particular business. By materializing thought, an achievement takes on the form of property, in the enjoyment of which the proprietor is protected by the law, and for the violation of which he is personally aggrieved and has what is known, and before explained, as a *right of action*, a phrase frequently employed to denote this class of property.

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## PATENTS

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### DEFINITION AND HISTORY

2. A **patent** is the grant by a government to the author of a new and useful invention, or to his assigns, of the exclusive right of exploiting that invention for a specified term of years;<sup>3</sup> a franchise of a new and useful improvement securing to an inventor for a limited term the exclusive right to make, use, and vend the article or object, as tending to promote the progress of science and the useful arts, and as a matter of compensation for the labor and expense in making and reducing the invention to practice for the public benefit. The grant of a patent is not the exercise of any prerogative to confer upon the subjects of a government the exclusive property in that which would otherwise belong to the common right. As regarded in the United States, it more clearly resembles a contract, which, under constitutional authority, congress authorizes to be entered into between the government and the inventor, securing to him, for a limited time, the exclusive enjoyment of the practice of his invention, in consideration of the disclosure of his secret to the public, and his relinquishment of his invention to the public at the end of the term.\*

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<sup>3</sup> Cent. Dict.

<sup>4</sup> 11 Wall. (U. S.) 553 (1870); 32 Fed. Rep. 617 (1876).

As originally used in England, the term *patent* signified an instrument conferring a grant of land, an honor of franchise; it was designated *letters patent*, from being delivered open, and by way of contradistinction from instruments like the French *lettres de cachet*, which went out sealed. In the United States, the word *patent* is sometimes understood to mean the title-deed by which a government, either state or federal, conveys its lands; but, in its more usual acceptation it refers to the instrument by which the federal government secures to an inventor the exclusive privilege or right to his own invention, as herein explained.<sup>5</sup>

3. In England, for many years, the power of granting these exclusive privileges by letters patent was abused by the sovereigns, by conferring the sole right of dealing in certain commodities upon particular individuals, either as a matter of royal favor or as a means of replenishing the royal treasury. This despotic power of the crown made these exclusive privileges extremely odious by the favoritism or mercenary purpose of their granting, and reached its height in the Elizabethan period, proving in many instances superior to the law until the 17th century when the Statute of Monopolies was passed, prohibiting all grants of that nature;<sup>6</sup> but, by letters patent to the inventor of any new manufacture, the king was permitted to secure to such person the sole right to make and vend the same for a term not exceeding fourteen years. Under that statute has grown up the present system of British patent law, from which that of the United States has to a great extent been derived. Other statutes were subsequently passed, but were repealed by the passage of the Patent Act, 1883, which, besides introducing a new procedure, modified the law to some extent, and by which patents are granted to any person, whether a British subject or not.<sup>7</sup> The inventions for which patents are obtained are chiefly either vendible articles formed by chemical or mechanical operations, such as cloth, alloys, vulcanized india

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<sup>5</sup> Bouv. Law Dict.

<sup>6</sup> Stat. 21 Jac. I, c. 8; Hallam Const. Hist. 153, 205.

<sup>7</sup> Stat. 46 & 47 Vict., 1883, c. 57.

rubber, and the like, or machinery and apparatus or processes. The principal classes seem to be: (1) New contrivances applied to new ends; (2) contrivances applied to old ends; (3) new combinations of old parts, whether relating to material objects or processes; (4) new methods of applying a well-known object.<sup>8</sup>

In the United States, congress is empowered by the constitution to legislate "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." By congressional enactment, any person, whether a citizen or alien, may obtain a patent protection for a term of seventeen years who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in that country, and not patented or described in any printed publication in that or any foreign country, before his discovery or invention thereof, and not in public use or on sale for more than two years prior to his application, unless the same be proved to have been abandoned.<sup>9</sup> The fact that the invention has been first patented in a foreign country will not debar the inventor from obtaining a valid patent in the United States, unless the same have been introduced into public use in the latter country for more than two years prior to the application.

In the United Kingdom of Great Britain and Ireland and the Isle of Man, by statute, patents are granted to any person, whether a British subject or not.<sup>10</sup> The general principles as to what constitutes an invention or improvement are substantially the same as above stated, and there is a separate statute for each of the principal British colonies.

<sup>8</sup> *Encyc. Brit.*

<sup>9</sup> U. S. R. S., Sec. 4,886

<sup>10</sup> Stat. 46 & 47 Vict., 1883, c. 57.

### SUBJECT-MATTER OF PATENT

4. It will be observed that in the United States there are four classes of inventions which may be subjects of patents: (1) An art; (2) a machine; (3) a manufacture; and, (4) a composition of matter. In Great Britain, letters patent granting exclusive privileges can be issued only to the inventors of a "new manufacture"; but the word *manufacture* has been construed by the courts to be coextensive in signification with the whole of the four classes of invention recognized by the United States law, thus making the field of invention in Great Britain coincident with that provided by the law of the United States, and the legal subject-matter is the same in each country.<sup>11</sup>

5. **What Constitutes an Invention.** — The term **invention** ordinarily stands for something that is originated; the act or process of finding out some new thing; the contriving of something useful which did not exist, and was not known, before. Whenever this process has been exercised, there will be found the subject-matter of a patent.<sup>12</sup> A conception of the mind is not an invention until represented in some physical form, and unsuccessful experiments of projects, abandoned by the inventor, are equally destitute of that character.<sup>13</sup> Nor does mere discovery fulfil the meaning of invention. Every discovery is not a patentable invention, even though in the United States statute the word *discovered* is used as signifying the finding out of some new thing. Discovery, commonly, is as well applied to the finding out of any old thing as of a new one; while invention, in patent law, relates especially to absolute origination. Thus the finding out of the properties of steam or electricity, forces which existed before, is properly spoken of as having been discovered; but in referring to a machine first found out and made to apply those discoveries to practical use, it would be properly termed an invention.<sup>14</sup>

<sup>11</sup> Bouv. Law Dict., citing 2 M. & W. (Eng.) 544 (1837).

<sup>12</sup> 5 Blatchf. (U. S.) 46 (1862).

<sup>13</sup> 140 U. S. 481 (1891); 20 Wall. (U. S.) 498 (1874).

<sup>14</sup> Bouv. Law Dict.



A patentable invention is a mental result. It must be new and sworn to be of practical utility.<sup>15</sup> The law requires that, to be entitled to a patent, a person must have invented or discovered some "new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement thereof." It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must amount to an invention or discovery.<sup>16</sup> The word *useful* is incorporated into the statute in contradistinction to mischievous or immoral. For instance, a new invention to poison people, or to promote debauchery, or to facilitate private assassination, is not a patentable invention. But, if the invention steer wide of these objections, whether it be more or less useful, is a circumstance very material to the interests of the patentee, but of no importance to the public. If it be not extensively useful, it will silently sink into contempt and disregard.<sup>17</sup>

Inventive skill is that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what before had not existed, or bringing to light what lay hidden from vision.<sup>18</sup> The test of invention is originality; if that be successfully exercised, its product is protected. It is immaterial whether originality be shown "in a greater or less degree, or whether the new idea revealed itself to the inventor by a sudden flash of thought, or dawned on his mind after groping his way through many and dubious experiments."<sup>19</sup>

**6. Patentable Arts.**—Whoever discovers that a certain useful result will be produced in any art by the use of certain means, is entitled to a patent for it, provided he specify the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition to or subtraction from them, produce precisely the result he discovers.<sup>20</sup> This is also true of other classes of inventions.

<sup>15</sup> 21 Wall. (U. S.) 112 (1875).

<sup>16</sup> 132 U. S. 693 (1890).

<sup>17</sup> 1 Mas. (U. S.) 182 (1817).

<sup>18</sup> 113 U. S. 72 (1885).

<sup>19</sup> 6 Blatchf. (U. S.) 195 (1868).

<sup>20</sup> 15 How. (U. S.) 119 (1853); 102 U. S. 727 (1881).

An **art**, in the sense of the patent law, is a process or mode of treatment of certain materials to produce a given result. It is an act, or series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. The machinery pointed out as suitable to perform the process may or may not be new or patentable; whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence.<sup>21</sup> The elements of a process may be old, but when combined for the purpose of putting a new idea to practical use, they constitute a new and useful process.<sup>22</sup>

The term *art* applies to all those cases where the application of a principle is the most important part of the invention, and where the machinery, apparatus, or other means by which the principle is applied are incidental only and not of the invention. It applies also to all those cases where the result, effect, or manufactured article is old, but the invention consists in a new process or method of producing such result, effect, or manufacture.<sup>23</sup> A new and useful art, or a new and useful improvement of any known art, is as much entitled to the protection of the law as a machine or manufacture. The English patent acts are confined to *manufactures* in terms; but the courts have construed them to cover and protect arts as well as machines, without using the term art.<sup>24</sup>

An inventor may use any means, new or old, in a new application of some property in nature to produce a new and useful result to the exclusion of all other means.<sup>25</sup> This is well illustrated in the Bell telephone cases, which mark the distinction between an art or process and a principle of nature. By the act or process of transmitting speech by telephone, "electricity, one of the forces of nature, is

<sup>21</sup> 94 U. S. 780 (1877).

<sup>22</sup> 13 Blatchf. (U. S.) 307 (1876).

<sup>23</sup> 15 How. (U. S.) 130 (1853), citing Curt. Pat. 80.

<sup>24</sup> 15 How. (U. S.) 130 (1853).

<sup>25</sup> 2 Blatchf. (U. S.) 260 (1851).

employed, but electricity left to itself will not do what is wanted. The art consists in so controlling the force as to make it accomplish the purpose. It had long been believed that if the vibrations of air caused by the voice in speaking could be reproduced at a distance by means of electricity, the speech itself would be reproduced and understood. How to do it was the question. Bell discovered that it could be done by gradually changing the intensity of an electric current, so as to make it correspond to the changes in the density of the air caused by the sound of the voice. This was his art. He then devised a way in which these changes of intensity could be made and speech actually transmitted. Thus his art was put in condition for practical use. In doing this both discovery and invention, in the popular sense of those terms, were involved—discovery in finding the art, and invention in devising the means of making it useful.”<sup>26</sup>

Processes of manufacture which involve chemical or other similarly elementary actions are patentable, though mechanism may be necessary in carrying out the process, while those which consist solely in the operation of a machine are not. Where such mechanism is subsidiary to the chemical action, the fact that the patentee may be entitled to a patent upon the mechanism does not impair his right to the patent for the process. A valid patent cannot be obtained for a process which involves nothing more than the operation of a piece of mechanism, that is to say, for the function of a machine.<sup>27</sup> Where the process is described with the method of operation of a machine, the machine alone is patentable; the product, unless itself new, is not patentable.<sup>28</sup>

**7. Machines.**—The term **machine**, in patent law, includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result.<sup>29</sup> It is to be distinguished from a process in being a thing visible to the naked eye; whereas, a process is a mode of acting, a conception of the

<sup>26</sup> 126 U. S. 1 (1888), by Waite, C. J.

<sup>27</sup> 153 U. S. 332 (1893).

<sup>28</sup> 32 Fed. Rep. 221 (1885).

<sup>29</sup> 15 How. (U. S.) 267 (1853).

mind seen only by its effects when being executed or performed.<sup>30</sup> When the effect is produced by chemical action, or by the application of some element or power of nature, or of one substance to another, such methods or operations are called *processes*.<sup>31</sup> The act or series of acts which constitute the art, become, in the machine, inseparably connected with a specific physical feature. A machine differs from all other mechanical instruments in that its rule of action resides within itself. The structural law of a machine is its one enduring and essential characteristic.<sup>32</sup>

As treated in the patent law, such a combination as, when in operation, will produce some specific final result, is regarded as an entire machine. For although a new machine, or a new improvement of a machine, is an invention, and although only one invention can be included in a single patent, still several different contrivances, each of which is in one sense a machine, may all be separately claimed in a single patent, if they all contribute to improve or to constitute one machine, and be intended to produce a single ultimate result; and a new combination of machines is patentable whether the machines be new or old.<sup>33</sup>

8. For the purpose of proper explanation, inventions pertaining to machines are divided into four classes.<sup>34</sup>

1. Where the invention embraces the entire machine, as a car for a railway, a sewing machine, and the like. Under such a patent, the patentee holds the exclusive right to make, use, and vend to others to be used, the entire machine. If another, without license, make, use, or vend any portion of it, he invades the right of the patentee.<sup>35</sup>

2. Where the invention embraces one or more of the elements of the machine, but not the entire machine, as the colter of a plow or the divider of a reaping machine. In this class of patents, any person may make, use, and vend all other parts of the machine or implement, and he may

<sup>30</sup> 102 U. S. 727 (1881).

<sup>31</sup> 4 Fish. Pat. Cas. 175 (1870).

<sup>32</sup> Rob. Pat., Sec. 175.

<sup>33</sup> 3 Wheat. (U. S.) 454 (1818); 3 W. & S. (Pa.) 266 (1842).

<sup>34</sup> 3 Cliff. (U. S.) 639 (1865).

<sup>35</sup> *Ibid.*

employ a colter or a divider in the machine mentioned, provided it be substantially different from that embraced in the patent.<sup>36</sup>

3. Where both a new element and a new combination of elements previously used and well known are embraced in the invention. Here the property in the patent consists in the new element and in the new combination of elements; and no persons may make, use, or vend the machine containing such new elements or such new combination, but if it be capable of use without the patented improvements, they may make, vend, or use it without becoming liable as infringers.<sup>37</sup>

4. Where all the elements of the machine are old, and where the invention consists in a new combination of those elements, whereby a new and useful result is obtained. Most of the modern machines are of this class, and many are of great ability and value. In this class, the invention consists solely in the new combination, and the rule is that the property of the inventor, if duly secured by letters patent, is in all cases exactly commensurate with the invention. However, the invention is but an improvement on an old machine, and, consequently, the patentee cannot treat another as an infringer who has also improved the original machine by the use of a combination substantially different, although the machines may produce the same result. Inventions of this class are just as meritorious as those of any other class, and the property of the inventor is entitled to the same protection.<sup>38</sup>

By *property of the inventor* is meant the exclusive right which the letters patent secure to him, to make, use, and vend to others to be used, the improvement therein described for the term specified in the patent. The patentees have that property in their inventions as secured by letters patent and no other; hence, the courts uniformly hold that patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eye of the law, but they are to receive a liberal construction, and, if practicable, are to be so interpreted as to uphold and not to destroy the rights of the inventor.<sup>39</sup>

<sup>36</sup> 3 Cliff. (U. S.) 639 (1865).

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*



**9. Manufactures.**—Commonly, the term **manufacture** means the production of articles for use from new or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.<sup>40</sup> As regarded in patent law, the term has a more limited signification in the United States, where there are three other classes of inventions, than in Great Britain, where it is used in the widest sense, including all classes, being there defined to be “anything made by the hand of man.”<sup>41</sup> Hence, it is to be defined specifically as an instrument created by the exercise of mechanical forces and designed for the production of mechanical effects, but not capable, when set in motion, of attaining, by its own operation, to any premeditated results. It receives its rule of action from the external force which furnishes its motive power. A manufacture requires the constant guidance and control of some intelligent agent; a machine operates under the direction of that intelligence with which it was endowed by its inventor when he imposed on it its structural law. The parts of a machine considered separately from the machine itself, all kinds of tools and fabrics, and every other vendible substance, which is neither a complete machine nor produced by the mere union of ingredients, are included under the title manufacture.<sup>42</sup> Examples of manufactures are a wooden pavement;<sup>43</sup> a bond and coupon register in the form of a book.<sup>44</sup>

A manufacture has been held to be synonymous with *product*, though it has been construed to mean the process of manufacturing. It is patentable in the sense of product only when it is new in itself, not merely when it is produced by a new process, or new machinery.<sup>45</sup> In other words, although a new process for producing an article is patentable, the product itself cannot be patented if it be old.<sup>46</sup>

<sup>40</sup> Cent. Dict.

<sup>41</sup> Bouv. Law Dict., citing 8 T. R. (Eng.) 99 (1799).

<sup>42</sup> Bouv. Law Dict., citing Rob. Pat., Sec. 182.

<sup>43</sup> 2 Web. Pat. Cas. (Eng.) 126 (1843).

<sup>44</sup> 3 Fed. Rep. 338 (1880).

<sup>45</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 18, pp. 68, 69, citing 23 Wall. (U. S.) 566 (1874); 94 U. S. 568 (1876); 2 Cliff. (U. S.) 351 (1864); 1 Holm. (U. S.) 208 (1873).

<sup>46</sup> 111 U. S. 293 (1884).

**10. A Composition of Matter.**—By a **composition of matter** is meant a mixture or chemical combination of materials or ingredients. The term is frequently used synonymously with compound and mixture. It is patentable under the patent law of the United States, as has been seen.<sup>47</sup>

**11. Improvements.**—An **improvement**, in patent law, is held to mean something in aid of a patentable object which makes it better.<sup>48</sup> It has essential reference to a subject-matter to be improved; it is not original, but embraces and either adds to or alters the original;<sup>49</sup> and it can be patented to the inventor of an invention which is the basis of the improvement.<sup>50</sup> All that the improver can have patented is his improvement.<sup>51</sup>

**12. Designs.**—A **design** is an instrument created by the imposition on a physical substance of some peculiar shape or ornamentation which produces a particular impression upon the human eye, and through the eye upon the mind. Its creation involves a change in the substance itself and not merely in the mode of presenting it for sale, and affects, not its abstract qualities nor those on which its practical utility depends, but those only which determine its appearance to the sight.<sup>52</sup>

It is held that the acts of congress were plainly intended to give encouragement to the decorative arts.<sup>53</sup> Therefore, any person may obtain a patent who by his own industry, genius, efforts, and expense, has invented and produced any new and original design for a manufacture, bust, statue, alto-rilievo, or bas-relief; or any new and original design for the printing of woolen, silk, cotton, or other fabrics; any new and original impression, ornament, pattern, print, or picture, to be printed, painted, cast, or otherwise placed on or worked into any article of manufacture, or any new, useful, and original shape or configuration of any article of

<sup>47</sup> Bouv. Law Dict.; 7 Wall. (U. S.) 327 (1869); 19 Wall. (U. S.) 433 (1874).

<sup>48</sup> 4 Blatchf. (U. S.) 238 (1858).

<sup>49</sup> 1 Cliff. (U. S.) 538 (1860).

<sup>50</sup> 15 How. (U. S.) 122 (1853).

<sup>51</sup> Fish. Pat. Cas. 108 (1850).

<sup>52</sup> Bouv. Law Dict., quoting Rob. Pat., Sec. 200.

<sup>53</sup> 14 Wall. (U. S.) 511 (1871).

manufacture, the same not having been known or used by others before his invention or production thereof, or patented or described in any printed publication.<sup>54</sup> Patents for designs are granted for the term of three years and six months, or for seven years, or for fourteen years, as the applicant may elect, upon payment of the fee prescribed and other due proceedings had, the same as in cases of inventions or discoveries.

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### CAVEATS

**13.** A *caveat*, in patent law, is a notice filed in the proper governmental office to prevent the issue of a patent on a particular device to any other person until the caveator shall have an opportunity to establish his priority of invention.<sup>55</sup> Its purpose and effect is to protect the inventor from the granting of any patent for an interfering application without his knowledge, and gives the caveator who has exercised due diligence in reducing his invention to practice the right to carry back his invention to the date of the filing of the caveat.<sup>56</sup>

In the United States, any citizen, or alien who has resided in that country for one year next preceding the filing and who has made oath of his intention to become a citizen, who has made any new invention or discovery, and desires further time to mature it, may file a caveat. This notice contains a description of the device with its distinguishing features, and a prayer for protection of the caveator's right until he shall have matured his invention. As soon as it is received, the caveat is filed in the secret archives of the patent office and preserved in secrecy. It is operative for one year from its filing, at the end of which time it may be renewed.<sup>57</sup>

A caveat need contain nothing as to form except an intelligible description of the invention which the caveator claims to have made, giving its distinguishing characteristics with sufficient precision to enable the office to determine whether there be a probable interference when a subsequent application is filed. A caveat cannot be withdrawn, but copies may

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<sup>54</sup> U. S. R. S. 4,929.

<sup>55</sup> Bouv. Law Dict.

<sup>56</sup> 6 Fish. Pat. Cas. 424 (1873).

<sup>57</sup> U. S. R. S., Sec. 4,902.

be obtained. Any correction or addition must be made by filing a separate paper.<sup>58</sup>

By filing a caveat, an inventor can obtain a year to perfect his invention, without the risk of having the patent to which he believes he is entitled granted to another in the meantime. Therefore, upon application within one year by another person, covering the same invention claimed by the caveator, it is the duty of the commissioner of patents to give notice of such application to the caveator, who is required to file his description within three months. The caveat is evidence of the date of the invention, but it does not necessarily show that the invention was then completed; the caveator is not concluded by his description of the invention, but may proceed with his experiments.<sup>59</sup>

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## APPLICATION FOR A PATENT

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### PATENT SYSTEM AND PROCEDURE

14. In the United States, the patent office is under the control of the department of the interior. The head of the department is called the commissioner of patents. There is also an assistant commissioner, three examiners-in-chief, a chief clerk, an examiner in charge of interferences, twenty-four principal examiners, twenty-two first, and twenty-two second, examiners. All patents are issued in the name of the United States of America, under the seal of the patent office, and are signed by the secretary of the interior or under his direction by one of the assistant secretaries of the interior, and countersigned by the commissioner of patents. They are recorded together with the specifications in the patent office in books kept for that purpose. The secretary of the interior has no power to revise the action of the commissioner of patents in awarding priority of an invention to an applicant for a patent, such action being *quasi* judicial. After determining that a patent shall issue, the commissioner acts ministerially in preparing the patent for the signature

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<sup>58</sup> Rob. Pat., Sec. 445.

<sup>59</sup> *Ibid.*, Sec. 438.

of the secretary, and in countersigning it. A mandamus will lie to compel the performance of these duties.<sup>60</sup>

Prior to the passage of the English Patent Act, British letters patent extended to all the English colonies. The Patent Act restricted the rights granted to Great Britain and Ireland, the Channel Islands, and the Isle of Man; but subsequently the legislatures of the colonies enacted laws of their own for the protection of inventions. As a rule, the application in any colony must be made by petition accompanied with a specification and drawings of similar nature to those used in the British application, and, in most cases, the application must be made by the inventor himself or by his assignee, or by some person holding his power of attorney.<sup>61</sup> Each of the Australian colonies has its own patent system, but, as these colonies have been formed into a commonwealth, it is expected that there will soon be a general patent system. The procedure for obtaining patents in Great Britain and other countries is in many respects similar to that described as in operation in the United States, with the necessary officials corresponding to those whose duties under the American system have been explained.

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#### TERMS OF PATENTS

**15.** The term of a patent in the United States is seventeen years; in Great Britain, including Ireland, Scotland, Wales, the Channel Islands, India, British Honduras, British Guiana, Jamaica, and Cape Colony, it is fourteen years; in Canada, six years, and extensible to eighteen years by the payment of forty dollars; in Argentine Republic, Austria, Belgium, Brazil, Denmark, France, Germany, Hungary, Italy, Norway, Portugal, Russia, Sweden, Switzerland, Venezuela, it is fifteen years; in Spain and Mexico, twenty years; in Chili, ten years; Uruguay, nine years; in the United States of Colombia, five, ten, fifteen, or twenty, years, according to cost; in Barbadoes, seven years; in China, fourteen years. No patents are granted in Holland.

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<sup>60</sup> 112 U. S. 50 (1884).

<sup>61</sup> Encyc. Brit.



## INVENTOR'S RIGHT TO A PATENT

16. He is the first inventor in the sense of the patent law, and entitled to a patent for his invention, who first perfected and adapted the same to use. Until the invention is so perfected and adapted to use it is not patentable under the patent laws.<sup>62</sup> The first of two rival inventors is entitled to the patent if he use reasonable diligence in perfecting and adapting his invention.<sup>63</sup> Where an unreasonable delay is allowed to occur between the perfection of an invention and the application, and in the meanwhile other parties have independently invented the device and put it to use, a patent granted is void.<sup>64</sup>

Novelty is essential to patentability.<sup>65</sup> Anything newly invented is a novelty, in the patent-law sense. To be new in that sense, there must be a discovery of new principles, or the employment of the old ones in a new proposition, in a new process, or to a new purpose.<sup>66</sup> When a patent is for a combination, it is immaterial whether the patentee be the inventor of any of the elements or ingredients. They may all be old, and yet if the patentee be the first to combine them for a particular purpose, he will be protected in that improvement.<sup>67</sup>

"Novelty," says an authority, "is the rock upon which most patents split; for, if it can be shown that other persons have used or published the invention before the date of the patent, it will fall to the ground, although the patentee was an independent inventor, deriving his ideas from no one else. . . . This prior use of the invention was held to deprive the patent of validity. It is, therefore, a very frequent subject of inquiry whether an invention has been previously used to such an extent as to have been publicly used in the sense attached by the courts to this phrase. The inventor himself is not allowed to use his invention either in public or secretly, with a view to profit, before the date of the

<sup>62</sup> 2 Blatchf. (U. S.) 260 (1851).

<sup>63</sup> 2 Cliff. (U. S.) 224 (1863).

<sup>64</sup> 23 How. (U. S.) 487 (1859).

<sup>65</sup> 105 U. S. 566 (1881).

<sup>66</sup> 10 Blatchf. (U. S.) 109 (1872).

<sup>67</sup> 15 How. (U. S.) 62 (1853); 20 How. (U. S.) 378 (1857).

patent. Thus, if he manufacture an article by some new process, keeping the process an entire secret but selling the product, he cannot afterwards obtain a patent in respect of it. If he were allowed to do this he might in many cases obtain a monopoly in his invention for a much longer period than that allowed by law.”<sup>68</sup>

The rule as to use by the inventor “does not apply to cases where the use was only by way of experiment with a view to improve or test the invention; and it has been repeatedly decided that the previous experiments of other persons, if incomplete or abandoned before the realization of the discovery, will not have the effect of vitiating a patent. Even the prior discovery of an invention will not prevent another independent discoverer from obtaining a valid patent if the earlier inventor kept the secret to himself, the law holding that he is the true and first inventor who first obtains a patent.”<sup>69</sup>

An experiment may be a trial either of an incomplete mechanical structure to ascertain what changes or additions may be necessary to make it accomplish the design of its projector, or of a completed machine to test its efficiency. In the first case, abandonment having taken place, no effect is caused on subsequent invention; but if the experiment in the second case show the capacity of the machine to affect the inventor’s object, he has the merit of producing complete invention.<sup>70</sup> Where an inventor breaks up his invention, not wholly intending to abandon it, yet uncertain whether he will resume the subject, thus showing uncertainty whether or not it will be given to the public, another, who invents the same thing and patents it, will be regarded as the first inventor.<sup>71</sup>

**17.** One cannot obtain a monopoly of that which is already a part of the stock of public information. A patent is anticipated by publication which clearly sets forth the invention it is intended to describe. In order to defeat a patent, however, a description in a prior publication must

<sup>68</sup> Encyc. Brit.

<sup>69</sup> *Ibid.*; 23 Wall. (U. S.) 161 (1874);  
1 Fish. Pat. Cas. 527 (1850).

<sup>70</sup> Bann. & Ard. Pat. Cas. 177 (1874).

<sup>71</sup> 2 Cliff. (U. S.) 224 (1863); 7 Wall. (U. S.)  
685 (1868).

contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person, skilled in the art or science to which it appertains, to make, construct, and practice the invention patented. It must be an account of a complete and operative invention, capable of being put into practical operation.<sup>72</sup>

A patentee, to be regarded as the first inventor, must be the inventor with reference to foreign countries, as well as to his own; he must be the original inventor, not an importer of the invention; but proof of foreign use of the article patented will not supersede a patent granted in the United States, unless the alleged invention were patented in some country, or the same were described in some printed publication.<sup>73</sup>

#### FORMAL PROCEDURE

**18. Specification.**—The inventor of a complete invention, desiring to apply for a patent, must make application in writing to the commissioner of patents. He must also cause to be prepared a specification of the exact nature of his invention and the object of his application. Attached to the specification should be a drawing or photograph of his invention, as the nature of the case admits. In cases which admit of representation by a model, a model of convenient size to exhibit the parts of the device is required to be furnished, and where the invention is for a composition of matter, specimens of the materials or ingredients of the composition in sufficient quantity for experiment should be furnished.<sup>74</sup> Where the inventor has engaged an attorney, a power of attorney authorizing the attorney to act for him must accompany the application.

The specification should contain a complete description of the invention in such full, concise, and exact terms as to enable any person skilled in the art or science to which it relates, to make, construct, or use it. But, if there be drawings or models, they are to be taken into consideration in determining whether the specification be sufficiently clear,

<sup>72</sup> 11 Wall. (U. S.) 516 (1868).

<sup>73</sup> 95 U. S. 214 (1877).

<sup>74</sup> U. S. R. S., Secs. 4,890, 4,891.

though the scientific principles on which the device operates need not be known to the inventor nor set forth in the specification.<sup>75</sup> The specification must be verified by the oath of the applicant, which may be taken before any person qualified to administer oaths, that he believes himself to be the original and first inventor of the invention for which he solicits a patent, and that he does not believe the same was ever before known or used. The applicant is also required to state of what country he is a citizen.<sup>76</sup>

**19. Drawing.**—Where a drawing is essential, the applicant shall furnish one copy thereof, and another, furnished by the patent office, shall be attached to the patent as part of the specification. It is held that the drawing is a portion of the patent; it need not be a working drawing, nor is it necessary that a machine made in accordance with it would work.<sup>77</sup>

**20. Claim.**—The applicant must explain what the invention is—what he determines he is entitled to. This is a statutory requirement prescribed for the purpose of defining the precise character of the invention and is to be read in the light of the description contained in the specification. If an invention be not covered by the claim it will not be protected by the patent.<sup>78</sup> The terms of the claim are carefully scrutinized in the patent office; the scope of the patent is given by the claim, and the patentee in a suit brought on the patent is bound by his claim.<sup>79</sup>

The words *substantially as described*, in a claim, refer back to the descriptive parts of the specification and are implied in a claim whether inserted or not.<sup>80</sup> The words *substantially as set forth*, are technical, and are equivalent to saying "by the means described in the text of the inventor's application for letters patent as illustrated by the drawings, diagrams, and model, which accompany the application."<sup>81</sup>

<sup>75</sup> 3 McLean (U. S.) 432 (1844).

<sup>76</sup> U. S. R. S. 4,892.

<sup>77</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 18, pp. 29, 30, citing U. S. R. S., Sec. 4,889; 2 Blatchf. (U. S.) 1 (1845); 1 Holm. (U. S.) 503 (1870).

<sup>78</sup> 148 U. S. 554 (1892).

<sup>79</sup> 95 U. S. 274 (1877).

<sup>80</sup> 19 Wall. (U. S.) 287 (1873).

<sup>81</sup> 25 U. S. App. 475 (1895).

**21. Examination.**—When an application is completed in the prescribed manner and filed in the patent office, it is examined by the proper officials with a view to ascertain whether the claim of the applicant be valid or not. If it appear that the claim is invalid and would not be sustained by the courts, the application is rejected.<sup>82</sup> But, as a general rule, the applicant is entitled to a patent if he demonstrated that he is the original and first inventor. His affidavit to the application raises the presumption that he is the first inventor. But, if he have either actually or constructively abandoned his invention to the public, he can never afterwards recall it and resume his right of ownership. Abandonment is a question of intention. It will be inferred by conduct from which an intention to abandon appears, either before or after the application, as by public use of the device for even less than two years, taken in connection with circumstances tending to show that the inventor did not intend to secure a monopoly.<sup>83</sup> A conclusive presumption of abandonment is public use or sale for more than two years before the application;<sup>84</sup> but to establish an abandonment, the sale must be a sale in the usual course of business of the completed invention.<sup>85</sup>

If it be ascertained in the examination that the thing for which a patent is applied for had been invented by any other person in the United States, or that it had been patented or described in any printed publication in that, or any foreign, country prior to its invention by the applicant, a patent will be denied. But a mere prior invention of the same thing in a foreign country, if not patented or described in some printed publication, will not affect the applicant's right to a patent. Under a recent statute, the patenting or publication of an invention in any foreign country, for more than two years before the application in the United States, or its being patented in a foreign country by the applicant for more than seven months before his application, bars the patent in the United States.<sup>86</sup>

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<sup>82</sup> Bouv. Law Dict.

<sup>83</sup> Rob. Pat., Sec. 349

<sup>84</sup> 9 Blatchf. (U. S.) 185 (1871); 123 U. S. 267 (1887).

<sup>85</sup> 2 Fed. Rep. 78 (1880).

<sup>86</sup> Bouv. Law Dict., citing Act Cong. 1897.



**22. Notice of Rejection.**—Whenever any claim for a patent is rejected, the commissioner of patents must give the applicant a brief statement of the reasons for such rejection, together with such information and references as may be useful in judging of the propriety of renewing his application or of altering his specifications. The specification is always open to amendment until the matter is finally disposed of, by granting of patent or otherwise. If, after the notice of rejection, the applicant persist in his claim for a patent, with or without altering his specification, the commissioner is required to order a reexamination.<sup>87</sup>

**23. Issue of Patents.**—In all cases, a patent in the United States must be issued to the inventor, if alive, or his assignee, if he have assigned his interest, and is required to be signed by the secretary of the interior and countersigned by the commissioner of patents, and recorded in the patent office.<sup>88</sup> If the invention be made jointly by two inventors, the patent must issue to both, if alive, or to their assignees. This is equally so where one makes a portion of the invention at one time and another at another time.<sup>89</sup> If each person invented a distinct part of a machine, each should obtain a separate patent for his invention.<sup>90</sup>

**24. Reissue.**—The United States statutes provide for the surrender of a patent for the purpose of reissue to the party having the legal title thereto, who may be either the patentee, his assignee, or his executor or administrator.<sup>91</sup> A surrender may be when the original patent is inoperative or invalid by reason of defective or insufficient specification. Want of proper description is a good cause for a reissue.<sup>92</sup> Where a patentee has claimed more than he had the right to claim, if the error have arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the patent may be surrendered and a reissue taken.<sup>93</sup>

<sup>87</sup> U. S. R. S., Sec. 4,903.

<sup>88</sup> U. S. R. S., Sec. 4,883.

<sup>89</sup> Bouv. Law Dict.

<sup>90</sup> 11 Fed. Rep. 505 (1882).

<sup>91</sup> U. S. R. S., Sec. 4,916.

<sup>92</sup> 24 Fed. Rep. 596 (1885); 113 U. S. 268 (1884).

<sup>93</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 18, pp. 36, 37, citing 19 Blatchf. (U. S.) 377 (1881); 102 U. S. 409 (1880); 3 Fish. Pat. Cas. 335 (1867).

**25. Extension of Patents.**—Formerly, in the United States, when patents were granted for the term of fourteen years, it was the practice of the commissioner of patents to grant an extension, or renewal, of an ordinary patent upon the application of the patentee. That practice has since been abrogated by act of congress, which provides that patents shall be granted for the term of seventeen years, and forbids further extension.<sup>94</sup> This was followed by a subsequent act which provided for the granting of patents issued prior to the date of passage of the act that extended the term to seventeen years. However, as congress alone is invested by the constitution with the right to grant patents, and though usually exercised by general laws, it may, in its discretion, grant patents to inventors outside of the general law, subject only to the limitation that the grants may be to the inventors or their legal representatives, and must not take away the right of property in existing patents.<sup>95</sup> So that, by special act, congress may extend any patent granted before to an applicant, and the form of extension may be the same as that in general use.<sup>96</sup>

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#### INTERFERENCES

**26.** In American patent law, an **interference** is a conflict between two patents or applications for patents which claim in whole or in part the same invention.<sup>97</sup> Whenever, in the judgment of the commissioner of patents, an application for a patent interferes with another pending application, or with any other unexpired patent, it is incumbent on the commissioner to give notice of the interference to the parties, and to direct an examination to determine the priority of invention.<sup>98</sup>

When the controversy is between two applications for patent, the patent will be granted to him who is shown to be first inventor, and will be denied to the other applicant, so far as the controverted point is concerned; but, where the

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<sup>94</sup> Act of Cong., 1861, c. 88.

<sup>95</sup> 1 How. (U. S.) 202 (1843).

<sup>96</sup> 7 Wall. (U. S.) 583 (1868).

<sup>97</sup> Cent. Dict.

<sup>98</sup> U. S. R. S., Sec. 4,904.

interference is between an application and an actual patent, all that can be done is to grant or withhold from the applicant the patent asked for, as there is no power in the patent office to cancel an existing patent. If a patent be granted to the applicant, where there is an existing patent for the same invention, there will be two patents for the same thing; the parties will thus stand on equal footing, and must settle their respective rights in the courts. If in an interference between two applications, the date fixed in the preliminary statement be no earlier than the date of filing the previous application, the priority is awarded to the earliest application.<sup>99</sup> Testimony is taken in contested cases, and the question of priority passed upon. An appeal lies to the examiners-in-chief and from them to the commissioner of patents, and from him to the court of appeals of the District of Columbia.

A judgment in an interference is held to be binding only on the parties to the record, and only in respect of further proceedings on the same question in the patent office, and not in the courts on the question of novelty and priority, though the courts will consider the question of novelty and priority on a motion for a preliminary injunction against the defeated party.

*Forfeiture and Renewal.*— Failure to pay the final fee within six months works a forfeiture of an allowed patent; but any person interested may file a second application for a patent for the same invention within two years after the allowance of the original application. The second application is not limited to what was allowed in the first patent, but may embrace the whole invention.<sup>100</sup> A new application for the same invention may also be filed after withdrawal or rejection of the original application, if it be presented without unreasonable delay. The two applications will be considered one continuous proceeding.

<sup>99</sup> Bouv. Law Dict.

<sup>100</sup> U. S. R. S., Sec. 4,897.

### INFRINGEMENT

**27. Jurisdiction of Courts.**—In the United States, on any question affecting the validity or infringement of letters patent, the federal courts have exclusive jurisdiction.<sup>101</sup> The state courts have exclusive jurisdiction over questions arising out of contracts made concerning patent rights or inventions, when there is no other source of federal jurisdiction involved, and also of torts not involving the infringement or validity of the patent.<sup>102</sup>

**28. The Parties.**—In an action for infringement of a patent, the plaintiff must be the one who holds the legal title, either as patentee, mortgagee, grantee, or assignee, though there are instances where licensees and others are proper parties to be joined, especially in equity; but ordinarily a licensee has not such interest as compels his joining in the suit.<sup>103</sup>

**29. The Action.**—Suits for infringement may be at law or in equity. If at law, the proper legal proceeding is action on the case.<sup>104</sup> Courts of equity will take cognizance in an action for infringement only when the patent has not expired prior to the commencement of the action, and will not expire before equitable relief can be obtained, unless there be some other equity outside of mere infringement to be adjusted between the parties.<sup>105</sup>

**30. Damages.**—The particular federal court which has jurisdiction in case of infringement of patents is the circuit court; in any circuit court of the United States, damages may be recovered in the name of the party interested. In case of an action at law, when the verdict is for the plaintiff,

<sup>101</sup> See *The Law in General: Judicial Power of the United States*.

<sup>102</sup> *Am. & Eng. Encyc. Law* (1st Ed.), Vol. 18, p. 70, citing 90 U. S. 547 (1874); 3 McLean (U. S.) 523 (1845); 24 Iowa 231 (1868).

<sup>104</sup> U. S. R. S., Sec. 4,919.

<sup>105</sup> *Am. & Eng. Encyc. Law* (1st Ed.), Vol. 18, p. 74, citing 26 Fed. Rep. 332 (1886); 14 Fed. Rep. 170 (1882); 105 U. S. 211 (1881).

<sup>103</sup> *Am. & Eng. Encyc. Law* (1st Ed.), Vol. 18, pp. 71, 72, citing 9 Fed. Rep. 40 (1881); 4 How. (U. S.) 646 (1846); 11 Fed. Rep. 711 (1882); 12 Blatchf. (U. S.) 202 (1874).

the court may enter judgment for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with costs; and a court of equity may award damages for infringement and increase the same in a similar manner. At law the plaintiff is entitled to recover what he has lost, though it exceed defendant's profits; in equity he may recover only the profits that the defendant has actually made.<sup>106</sup>

**31. Cause of Action.**—In general, whenever the party charged with infringement has incorporated in his arrangement or structure the substance of what the patentee has invented and properly claimed, he is responsible in damages to the latter.<sup>107</sup> The criterion of infringement is substantial identity of construction or operation; mere changes in form, proportion, or position, or substitution of mechanical equivalents, will still be infringements, unless they involve a substantial difference of construction, operation, or effect.<sup>108</sup>

**32. Defenses.**—One against whom an action for infringement is instituted may defend by proving: (1) That, for the purpose of deceiving the public, the description and specification filed by the patentee contained less than the whole truth relative to the invention, or more than necessary to produce the desired effect; (2) that the patent had been obtained for that which was invented by another, who was reasonably diligent in adapting and perfecting the same; (3) that the invention had been described in some printed publication prior to the patentee's supposed invention or discovery thereof; (4) that it had been in use or on sale for more than two years prior to the application, or had been abandoned; (5) that the patentee was not the original or first inventor of any material or substantial part of the thing patented.<sup>109</sup>

<sup>106</sup> Bouv. Law Dict., quoting U. S. R. S., Sec. 4,921; 97 U. S. 348 (1877); 151 U. S. 139 (1893).

<sup>107</sup> 1 Wall. (U. S.) 531 (1863).

<sup>108</sup> 3 McLean (U. S.) 250, (1843); 15 How. (U. S.) 62 (1853).

<sup>109</sup> U. S. R. S., Sec. 4,920.



These several defenses are substantial reasons for which patents may be refused. Besides these, there may be set up such defenses as want of invention, novelty, utility, absence of title in the plaintiff, title in the defendant, non-infringement, and estoppel.<sup>110</sup>

**33. Disclaimers.**—The patentee (plaintiff) in a suit for infringement may disclaim so much of his patent as is in excess of his real invention, and thus recover damages for the injury he has really sustained.<sup>111</sup> The effect of a disclaimer is to place the patent in a position of never having contained the matter disclaimed;<sup>112</sup> and, the purpose is to eliminate all claims for invention of which the patentee is not the first inventor or discoverer, and which, through inadvertence, accident, or mistake, and without fraudulent intention, have been included.<sup>113</sup> Thus, the disclaimer operates to legalize the suit on the patent to the extent to which the patentee can rightfully claim the patented invention.<sup>114</sup>

A disclaimer may be made before or after suit is brought, but it must be filed in the patent office without unreasonable delay, else all rights of action will be cut off.<sup>115</sup> It may be made by the inventor, assignee, or legal representative, and the extent of the interest of the person disclaiming should be stated in the disclaimer.<sup>116</sup>

## ASSIGNMENT

**34. Definition.**—Under the United States patent law, an **assignment** is an instrument in writing by which the entire interest in a patented invention, with the exclusive right to make, use, and vend the same throughout every section of the United States for the full term of the patent, is transferred.<sup>117</sup>

<sup>110</sup> Bouv. Law Dict., citing Rob. Pat.

<sup>111</sup> U. S. R. S., Sec. 4,922.

<sup>112</sup> 94 U. S. 187 (1876).

<sup>113</sup> 112 U. S. 642 (1884).

<sup>114</sup> 123 U. S. 582 (1887); U. S. R. S., Secs. 4,917, 4,922.

<sup>115</sup> 3 McLean (U. S.) 432 (1844); 1 Fish. Pat. Cas. 213 (1848).

<sup>116</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 18, p. 35, citing 3 McLean (U. S.) 432 (1844).

<sup>117</sup> 6 Cranch (U. S.) 324 (1810); 10 How (U. S.) 477 (1850).

As provided by statute, a patentee may assign his whole interest in, or an undivided part of, his patent; but, if he assign a part, it must be an undivided portion of his entire interest under the patent, placing the assignee upon an equal footing with himself for the part assigned. Upon such assignment, the patentee and his assigns become joint owners of the whole interest secured by the patent, according to the respective proportions which the assignment creates.<sup>118</sup> But such joint owners are not partners; they are not liable to each other for an individual use of the patented invention;<sup>119</sup> and their mutual rights, and just how far they are accountable to each other, appear to be unsettled.<sup>120</sup>

By an assignment in writing, a patentee may grant and convey an exclusive right under the patent to make and use, and to grant to others the right to make and use, the thing patented within and throughout some specified portion of the United States.<sup>121</sup> The latter is termed a **grant**, and differs from an assignment in relation to the territorial area to which they relate. Anything less than an assignment or a grant is called a **license**, which is a transfer of a less or different interest than either the interest in a whole patent or an undivided part of such whole interest, or an exclusive sectional interest. A license is further distinguished from an assignment and a grant in that either of the latter transfers the monopoly as well as the invention, while a license transfers only the invention and does not affect the monopoly otherwise than by estopping the licensor from exercising his prohibitory powers in derogation of the privileges conferred by him upon the licensee.<sup>122</sup>

**35. Requisites.** — A written instrument, to be an assignment, need not be formally drawn; any writing that contains words that make clear the intention to transfer and that designates the subject-matter to be assigned, is sufficient.<sup>123</sup>

<sup>118</sup> 10 How. (U. S.) 494 (1850); U. S. R. S., Sec. 4,898.

<sup>119</sup> 3 Blatchf. (U. S.) 201 (1854); 66 N. Y. 459 (1876).

<sup>120</sup> 32 Fed. Rep. 697 (1887).

<sup>121</sup> 1 Fish. Pat. Cas. 327 (1849).

<sup>122</sup> Rob. Pat., Sec. 806; 138 U. S. 252 (1890).

<sup>123</sup> 18 Blatchf. (U. S.) 92 (1880).

As in any other contract, the instrument is to be construed according to the rules governing the interpretation of written contracts.<sup>124</sup> So, too, as to the parties, the rules governing contracts made by different classes of persons, such as corporations, agents, married women, and others, are to be observed in the proper making of an assignment of a patent.

An assignment, or grant of a patent, is declared by statute to "be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, until it is recorded in the patent office within three months of the date thereof";<sup>125</sup> in other words, to protect the assignee and his assignees from subsequent purchasers without notice, the assignment must be recorded within three months of its date.<sup>126</sup> Recording, however, is not requisite to the validity of an assignment; if not recorded, it will be binding on the parties thereto, or on others having notice thereof, or mere trespassers.<sup>127</sup>

**36. Marks on Patented Articles.**—Any person who makes or vends an article under the protection of letters patent is required by the patent law to give sufficient notice to the public that the article is patented either by fixing thereon the word *patented*, together with the day and year the patent was granted; or when, from the character of the article, this cannot be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice.<sup>128</sup>

The law prescribes a penalty for every person who shall mark the word *patented* on any article for which he has not obtained a patent with the name or imitation of the name of any person who has a patent thereon, without the latter's consent, or who shall mark the word *patent* or its equivalent on any unpatented article.<sup>129</sup>

<sup>124</sup> 10 Wall. (U. S.) 367 (1869); 4 Blatchf. (U. S.) 271 (1859); 18 How. (U. S.) 289 (1855).

<sup>125</sup> U. S. R. S., Sec. 4,898.

<sup>126</sup> 18 Blatchf. (U. S.) 92 (1880).

<sup>127</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 18, p. 136, and cases there cited.

<sup>128</sup> U. S. R. S., Sec. 4,900.

<sup>129</sup> *Ibid.*, Sec. 4,901.

# THE LAW OF PATENTS, COPYRIGHT, AND TRADE-MARKS

(PART 2)

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## COPYRIGHT

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### DEFINITION AND NATURE

1. **Copyright** is the exclusive privilege granted by law to authors, composers, and the like, to print, publish, sell, and derive the profits from their intellectual productions, for a limited period, free from the interference or infringement of all other persons. It is a purely statutory privilege, and is obtained only after a strict compliance with the copyright laws. It is founded upon the natural right of every man to reap the fruits of his own intellectual efforts, and has relation only to the time when the author has published his production to the world. Until a man has published his ideas to the world, the copyright laws of a country have no application; for, wholly independent of such laws, the author of unpublished manuscript has a common-law property in his productions which a court of equity will be vigilant to protect.<sup>1</sup>

The word *copyright* is derived from the Latin *copia*, meaning plenty, and, in general, the right to make plenty. In the proper sense of the term, it is the protection afforded intellectual productions after they have once been published to the world. It consists in the exclusive privilege of printing or

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<sup>1</sup> 14 M. & W. (Eng.) 316 (1845); 14 How. (U. S.) 530 (1852); U. S. R. S., Sec. 4,952.

*For notice of copyright, see page immediately following the title page*

otherwise multiplying copies of the work, and of publishing and reaping the profits of the same. The natural right which every man has to his ideas ceases when he publishes them to the world. Thereafter they become the property of the public unless secured by copyright.<sup>2</sup>

In its specific meaning—the exclusive right of an owner to multiply his productions and publish the same—copyright differs from *literary property*, a more general term, meaning the exclusive right of the owner to possess, use, and dispose of intellectual productions. Literary property describes the interest of the author, or those claiming under him, in his works, whether before or after publication, or before or after a copyright has been secured;<sup>3</sup> it denotes the common-law ownership of the original work; whereas, copyright is the statutory right to make all copies of it that shall be made for a term of years.<sup>4</sup>

2. Blackstone defines this common-law right in the production of an original work, or literary property, as the right which an author may be supposed to have in his own literary composition, so that no other person without his leave may publish or make profit of the copies. The identity of literary composition consists entirely in the sentiment and language; the same conceptions, clothed in the same words, must necessarily be the same composition. Whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other person can have the right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind, when an author suffers his work to be published by another hand, without any claim or reserve of right, and without stamping on it any marks of ownership. In case the author sell a single book, or totally grant the copyright, it has been supposed,

<sup>2</sup> 5 McLean (U. S.) 82 (1849).

<sup>3</sup> Drone Copyr.

<sup>4</sup> Abb, Law Dict.



in the one case, that the buyer has no more right to multiply copies of that book for sale than he has to imitate for the like purpose the ticket which is bought for admission to an opera or a concert, and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. It is urged, on the other hand, that from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates, as being a right of too subtle and substantial a nature to become the subject of property at common law, and only capable of being guarded by positive statutes.<sup>5</sup>

Whatever inherent copyright rights have been supposed to exist at common law, by early English statutes, authors and their assigns were given the sole liberty of printing and reprinting their works for fourteen years, and no longer, and protecting the property in such works by penalties and forfeitures. By these statutes, also, the right for another term of the same duration returned to any author living at the end of the first term.<sup>6</sup> A similar privilege is extended, by other statutes, to the inventors of prints and engravings, for the term of twenty-eight years, besides an action for damages, with double costs.<sup>7</sup> In the United States, the common-law right of property in unpublished literary productions has long been recognized by the statute which provides that "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, . . . shall be liable to the author or proprietor for all damages occasioned by such injury."<sup>8</sup>

3. The passage of the copyright acts has not abrogated the common-law rights of an author to his unpublished manuscript; for a wanton infringement of his rights, exemplary damages may be given.<sup>9</sup> Private letters are embraced within this principle; for, although the receiver has a qualified property in them, the right to object to their publication

<sup>5</sup> 2 Black. Comm. 405, 406.

<sup>6</sup> Stats. 8 Anne, c. 19, 15 Geo. III, c. 53.

<sup>7</sup> Stats. 8 Geo. II, c. 13, 7 Geo. III, c. 38, 17 Geo. III, c. 57.

<sup>8</sup> U. S. R. S., Sec. 4,967.

<sup>9</sup> 73 Fed. Rep. 196 (1896).

remains with the writer, but the addressee may publish them for the purpose of justice publicly administered, or to vindicate his character from an accusation publicly made. With these exceptions, the making public of private letters without the consent of the writer will be enjoined by a court of equity, as being a breach of confidence or implied contract. Especially is this the case with third persons, standing in no privity to the parties, who attempt to publish private letters merely to subserve their own private purposes of interest, curiosity, or passion.<sup>10</sup>

The unauthorized publication of letters which are in the nature of literary compositions, for the avowed purpose of deriving a profit therefrom, is particularly obnoxious to the law, as being violative of the natural property rights of the author. A famous instance was the attempt of an English bookseller to publish the letters of Mr. Pope to Dean Swift. Mr. Pope applied for an injunction, whereupon the bookseller contended that the letters were in the nature of gifts to Dean Swift. The court held that, while perhaps the ownership of the paper on which the letters were written passed to their recipient, this did not confer upon any person into whose hands they might come a license to publish their contents; and the bookseller was restrained by injunction.<sup>11</sup> Another case was the letters of Lord Chesterfield to his son. The widow of the son had restored to Lord Chesterfield, at his request, certain of the letters, but kept copies of them. These, together with the rest of the letters, she attempted to publish after the death of Lord Chesterfield, but the court, at the suit of his executors, granted an injunction upon the ground that the widow had not obtained the consent of Lord Chesterfield or his executors to the publication.<sup>12</sup>

It must be obvious that the question when and under what circumstances an author may be deemed to have authorized the publication of his manuscript, is frequently a question of considerable nicety and importance. The soundest prevailing

<sup>10</sup> 2 Story (U. S.) 100 (1841).

<sup>11</sup> 2 Atk. (Eng.) 343 (1741).

<sup>12</sup> 2 Amb. (Eng.) 737 (1774).

rule appears to be that, when the express consent of the author to the publication is not affirmatively proved, the negative must be implied as a tacit condition.<sup>13</sup>

4. The delivery of lectures before an audience admitted by tickets, or to a class of students, is not a communication to the public, and an attempt to publish the lectures may be restrained by injunction; though each person attending is entitled to take the fullest notes for his personal use.<sup>14</sup> A photographer employed to take a person's photograph for money may be restrained from selling or exhibiting copies, on the grounds both of implied contract and of breach of confidence;<sup>15</sup> and so, the making and public exhibition of a statue of a deceased person may be enjoined upon the petition of his relatives.<sup>16</sup>

A dramatic work, even though it has not been printed or copyrighted, may be protected by injunction, when infringed by a spectator who paid to see it on the stage and wrote it from memory.<sup>17</sup> Recently, the United States district court, sitting in Chicago, issued a perpetual injunction against any further performance in the United States of Edmond Rostand's well-known dramatic romance, "*Cyrano de Bergerac*." The injunction was obtained at the instance of a Chicago playwright named Gross, who proved that "*Cyrano de Bergerac*" had been plagiarized from his own drama "*The Merchant Prince of Corneville*," which he had printed for private circulation some time previous to the Paris production in 1897 of Rostand's romance. The actor Mansfield obtained the American rights in the work, but Rostand had failed to copyright the drama under the international laws, and Mansfield was made one of the parties to the suit. The latter was awarded by the court an accounting of the profits on the performance of the play in the United States, but waived this right, explaining that he had sued as a matter of principle, and not for monetary gain, and accepted one dollar as compensation for all damages sustained.

<sup>13</sup> 2 Story (U. S.) 100 (1841).

<sup>14</sup> 60 Fed. Rep. 339 (1894).

<sup>15</sup> 40 Ch. Div. (Eng.) 345 (1888).

<sup>16</sup> 24 N. Y. Supp. 509 (1893).

<sup>17</sup> 133 Mass. 32 (1882).

## HISTORY AND DEVELOPMENT

5. As may be inferred by our previous statements concerning the claims in behalf of and against the common-law right of property in intellectual productions, some doubt exists among the authorities whether copyright existed in England, at common law; but it is settled that since the early statutes, before mentioned, were enacted, all the prior provisions for copyright were superseded, and that now copyright exists only by reason of some statute. In the United States, it is matter of history that the English common law was never imported in whole as a policy, but was only adopted in part by such of the colonies as found its principles suitable to their condition. There is, therefore, no such thing as common law of the United States analagous to the common law of England. What is common law in one state may not be such in another state. It is the judicial decisions, and the usages and customs of each state, which determine how far the English common law has been sanctioned in the state.<sup>18</sup>

Prior to the formation of the federal government, some of the colonies had passed laws for securing protection to authors, and the power to do so was one of their original branches of sovereignty which was afterwards ceded to congress.<sup>19</sup> The first national pronouncement on the subject was contained in the federal constitution, which authorized congress "to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."<sup>20</sup> In pursuance of the authority so vested, congress, in 1790, passed the first copyright act, which provided that the author of any map, chart, or book, already printed, should have "the sole right and liberty of printing, reprinting, publishing, and vending such map, chart, or book, for fourteen years."<sup>21</sup> By a subsequent act, the provisions of the prior act were extended to include

<sup>18</sup> 8 Pet. (U. S.) 591 (1834).

<sup>19</sup> *Ibid.*

<sup>20</sup> U. S. Const., Art. I, Sec. 8.

<sup>21</sup> Act May 31, 1790.

designs, engravings, and etchings.<sup>22</sup> In 1831, musical compositions were included, and the copyright term extended from fourteen to twenty-eight years, with a right of renewal for fourteen years to the author, or to his widow or children, which is the present term. In 1856, dramatists were secured in the performance of their plays. In 1870, all existing legislation was repealed and consolidated into one general act, by which, among other provisions, the librarian of congress was made the copyright officer of the government. A more recent act (March 3, 1891), though of high importance, cannot be said to constitute a new statute, but to be rather in the nature of amendments to the general copyright act which has been in force since 1870. The most important changes wrought in the law of copyright by this act, called the International Copyright Act, are stated in subsequent pages.<sup>23</sup> By a still more recent act it is provided that no government publication shall be copyrighted, and directs the public printer to sell, to any person applying therefor, additional or duplicate stereotype or electrotpe plates from which any government publication is printed, at a price not exceeding the cost of composition, the metal, and the making to the government, with ten per cent. added.<sup>24</sup> The latest act provided for the appointment of a register of copyrights, to whom since July 1, 1897, under the direction and supervision of the librarian of congress, has been delegated all the duties relating to copyrights.<sup>25</sup>

In England, the law of copyright is to be found partly in the provisions of fourteen acts of parliament, passed at different times between 1735 and 1875, and partly in common-law principles, nowhere stated in definite or authoritative form, but implied in a considerable number of reported cases in the law reports. As early as the statute 8 Geo. II, provision was made for copyrighting engravings, etchings, and prints, but it is a singular fact that it was not until the 25 & 26 Vict. (called the Fine Arts Copyright Act of 1862)

<sup>22</sup> Act April 29, 1802.

<sup>24</sup> Act Jan. 12, 1895.

<sup>23</sup> See *subtitles* Conditions Governing Copyright, What May Be Copyrighted, *infra*.

<sup>25</sup> Act Feb. 19, 1897.



that like provision was made for paintings, drawings, and photographs. The duration of copyright was first fixed by the statute 8 Anne, in 1710, at fourteen years, and, if the author be then alive, for fourteen years more. In 1814, by the statute 54 Geo. III, the term was extended to twenty-eight years absolutely, and for the life of the author if he were then living. By the statute 5 & 6 Vict., passed in 1842, the present term of copyright was fixed, namely, for the life of the author and seven years longer, or for forty-two years, whichever term last expires.

The copyright law at present in force in England is in substance the act of 1842, and extends, territorially, to every part of the British dominions, within, as well as without, the United Kingdom.

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#### INTERNATIONAL COPYRIGHT

**6. International copyright** is an international arrangement by which the right of an author residing in one country may be protected by copyright in such others as are parties to the arrangement.<sup>26</sup>

In order to be valuable, copyright requires the intervention of municipal law, and the law of nations has not taken notice of it, as it has of some other rights of property. "Therefore, all copyright is the result of some municipal regulation, and exists only in the limits of the country by whose legislation it is established. The international copyright which is established in consequence of a convention between any two countries is not an exception to this principle, because the municipal authority of each nation making such convention either speaks directly to its own subjects through the treaty itself, or is exerted in its own limits by some enactment made in pursuance of the international engagement."<sup>27</sup>

The Berne convention of 1887 was the first definitive organization of European states into an international copyright union, by the provisions of which authors may now

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<sup>26</sup> Cent. Dict.

<sup>27</sup> Bouv. Law Dict.

at once, upon fulfilling the requirements of their domestic copyright laws, secure, without further condition or formality, copyright for their productions in all the states belonging to the international union. The states comprising this union at the present time are Great Britain, France, Germany, Spain, and their colonies, Italy, Belgium, Switzerland, Morocco, Tunis, Luxembourg, Norway, Japan, and Hayti. The United States is not a member of the union, but by the act of March 3, 1891, has conditionally provided concerning foreign copyright, as follows:

“This act shall only apply to a citizen or subject of a foreign state or nation, when such foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may at its pleasure become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the president of the United States by proclamation made from time to time as the purposes of this act may require.”

In 1896, a diplomatic conference on international copyright was held in Paris to discuss a revision of the Berne convention, which framed what is called the Additional Act of May 4, 1896, and a declaration explanatory of certain terms of the convention.<sup>28</sup>

By presidential proclamations, since the passage of the act of 1891 down to November 20, 1899, the citizens or subjects of the following foreign countries have been admitted to the full enjoyment of the copyright laws of the United States, viz., Great Britain, Germany, France, Italy, Spain, Portugal, Belgium, Denmark, Switzerland, Mexico, Chile, Costa Rica, Netherlands (Holland), and possessions. In the countries named, the benefits of copyright are available for the productions of citizens of the United States, but only as they are available to the citizens of such countries.

<sup>28</sup> Birrell Copyr. p. 32.

7. A copyright obtained in any one of the countries bound by the international copyright union is good in all others. Authors and publishers in the United States are in the habit of complying with the laws of Great Britain to obtain a copyright which will bind in all other countries of the international union. To obtain copyright protection in Great Britain for works intended to be published also in the United States, simultaneous publication in both countries is essential. Registration in the United States should precede such day of publication, and in England should follow it.

Under the international copyright law, a copyright may be obtained for books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, paintings, sculpture, and engravings; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production published by any mode of impression or reproduction.

The Canadian government, though a dependency of Great Britain, has held to the view that it is not bound by the copyright laws of the home government, but that copyright and patent right are matters which belong properly to its own parliament. When, therefore, Great Britain, in 1887, accepted the provisions of the Berne convention on behalf both of itself and of its colonies, the Canadian government reserved the right to withdraw after a year's notice, and such notice was subsequently given. In 1889, the parliament passed an act, by the provisions of which copyright on works of literature or of art was given for a term of twenty-eight years to residents of the dominion or of any portion of the British Empire, subject to certain conditions, and which required the work so copyrighted to be printed or produced within the Dominion of Canada within one month after the date of its production in the country of origin, upon peril of having the work reproduced by any Canadian resident who might obtain a license for that purpose from the minister of agriculture. Such license was to carry no exclusive rights

to the work, and was not to prevent the importation of any other authorized editions of the work. This act aroused the bitter dissent of British authors, and, in 1895, was finally withdrawn. In 1896 an act was passed, with the approval of the British government, by the terms of which the work securing the Canadian copyright must be *printed* in the dominion, but the importation of the plates is permitted. The term of copyright is forty-two years from the date of publication. Any English or foreign author has the option either of producing the Canadian edition himself, or of leaving the production to a Canadian publisher. If no Canadian edition be printed, any work which has been copyrighted in Great Britain, or which has secured British copyright under the Berne convention, or under the United States act of 1891, will be entitled to copyright protection within the dominion, though the right to secure a license for a Canadian edition will, nevertheless, remain.

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#### WHAT MAY BE COPYRIGHTED

**8. Classification.**—The intellectual productions to which the law, in its largest significance, extends protection by copyright are of three principal classes: (1) Writings or drawings which are susceptible of multiplication by printing or engraving, to which class belong books, maps, charts, music, prints, and engravings; (2) designs of form or configuration susceptible of reproduction upon the surface of bodies, or in the shape of bodies, to which class belong statuary, bas-relief, and ornamental designs; and, (3) inventions in the useful arts, such as machinery, tools, manufactures, composition of matter, and processes or methods in the arts. In England and in the United States, however, the term copyright is generally confined to the first class of intellectual productions stated above, while the second and third classes are usually covered by letters patent.<sup>29</sup>

**9. Definition of Book.**—The word book means and includes every volume, part or division of a volume,

<sup>29</sup> Bouv. Law Dict.

pamphlet, sheet of letterpress, sheet of music, map, chart, or plan, separately published.<sup>30</sup> The term is not confined to a bound volume; neither does it necessarily imply a volume written or printed, made up of several sheets and bound together. The work may be printed on only one sheet; thus, a song published on a single sheet is held to come within the meaning of the word book as used in the English statute;<sup>31</sup> and a sheet containing diagrams for cutting dresses, and blanks for legal instruments, are held in the United States to come within the meaning of the word and are proper subjects of copyright.<sup>32</sup> It is the contents of a book, under its registered title, and not the title of a book taken singly, which is protected by copyright. A book publisher who had secured from Du Maurier the American rights in the novel "Trilby," sought to enjoin a dramatist who had used this title for a dramatic performance which did not present scenes from the story nor borrow any of its material. The court held that the copyright extended to protect the title only in conjunction with the book itself, and as the contents of the latter had not been purloined, the injunction to restrain the performance was refused.<sup>33</sup>

**10. Newspapers and Magazines.**—Though not expressly included among the subjects of copyright in the United States copyright law, newspapers and magazines are so mentioned as would seem to imply that they come within its protection.<sup>34</sup> In the United States, it is held that the copyright of a newspaper is the copyright of a book, within the meaning of the copyright law;<sup>35</sup> in England, it is claimed that a newspaper may be protected by statutory copyright.<sup>36</sup> In the case of periodicals, it is the common practice of newspaper publishers to enter, in addition to the regular general copyright of the periodical, a copyright for each

<sup>30</sup> Rep. Roy. Copyr. Com., 1878, Art 5.

<sup>35</sup> Drone Copyr. 168, 169; 26 Fed. Rep. 519 (1886).

<sup>31</sup> 2 Camp. (Eng.) 25 (1809).

<sup>32</sup> 7 Fed. Cas. 4,095 (1862); 37 Fed. Rep. 103 (1888).

<sup>36</sup> (1896) 1 Q. B. (Eng.) 147.

<sup>33</sup> 67 Fed. Rep. 904 (1895).

<sup>34</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 7, p. 529, citing U. S. R. S., Sec. 4,956, as amended by Act of March 3, 1891; 26 U. S. Stat. at L. 1,107.



special contribution; and it seems that any article published in an uncopyrighted newspaper may be copyrighted, upon compliance with the statutory provisions in the case of such article.<sup>37</sup>

**11. Prints and Labels.**—The word **print** in the United States copyright law has been construed to mean a picture, something complete in itself, similar in kind to an engraving, cut, or photograph. Thus it may include a photolithograph, but not a mere pattern print.<sup>38</sup> The words engraving, cut, and print apply only to pictorial illustrations or works connected with the fine arts. Prints and labels, designed for illustrative or decorative use on articles of manufacture, though included in the general classification of subjects of copyright, are not subject to copyright registration, but must be registered in the patent office. They are defined to be any device, picture, word or words, figure or figures, not a trade-mark, impressed or stamped directly upon the article of manufacture, or upon a slip or piece of paper or other material, or to bottles, boxes, or packages to indicate the contents of the package, the name of the manufacturer, or the place of manufacture, the quality of goods, direction for use, and the like. The application for registry in the patent office must be made to the commissioner of patents before the print or label is actually used, and must be signed by the proprietor or his agent. Five copies of the print or label must be filed, one of which, when duly registered, is certified under the seal of the commissioner of patents and returned to the proprietor. The certificate of such registration continues in force for twenty-eight years, and may be continued for fourteen years more upon filing a second application within six months before the expiration of the first term and complying with all the other regulations governing original applications. Within two months from the date of the renewal, a copy of the record thereof must be published for four weeks in a newspaper in the United States. Before being used, it is required that all new

<sup>37</sup> Drone Copyr. 170.

<sup>38</sup> 2 Fed. Rep. 217 (1880).

labels and prints shall have the words, "Copyrighted 190—, by———," printed thereon.

**12. Photographs.**—Photographs were expressly included in the articles to which copyright was extended by the act of congress of 1865, and the courts of the United States have repeatedly held photographers to be entitled to the privilege of copyright in their photographic productions, though hesitating to construe a photographer as an author.<sup>39</sup> The English copyright law designates the producer of a photograph as an author, in providing that "the author of any original painting, drawing or photograph . . . has the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and negative thereof, by any means or of any size, . . . but this right does not affect the right of any other person to represent any scene or object represented by any such painting";<sup>40</sup> and it is held that a copyright may be had in a photograph of an engraving from a picture.<sup>41</sup>

Within the meaning of the United States copyright law, a dramatic composition must have for its essential elements a narrative, or story.<sup>42</sup> A mere spectacular performance or unique stage dance, characterized by a novel arrangement of lights and shadows of drapery, cannot be copyrighted.<sup>43</sup> A mere mechanical contrivance in a play, producing novel scenic effects, is not protected by a copyright of the play in which it is introduced.<sup>44</sup> In England, a descriptive or dramatic song may be copyrighted.<sup>45</sup>

#### STATUTORY PROVISIONS

**13.** In the United States, articles that are the subjects of copyright were originally maps, charts, and books. Under the present law, articles for which copyright may be had include books, maps, charts, dramatic compositions, musical

<sup>39</sup> U. S. R. S. 4,952; 17 Fed. Rep. 591 (1883); 48 Fed. Rep. 262 (1891); 77 Fed. Rep. 966 (1897).

<sup>40</sup> Rep. Roy. Copyr. Com., 1878, Art. 21.

<sup>41</sup> L. R. 4 Q. B. (Eng.) 715 (1869).

<sup>42</sup> 50 Fed. Rep. 926 (1892).

<sup>43</sup> 1 Abb. (U. S.) 356 (1867).

<sup>44</sup> 33 Fed. Rep. 347 (1888).

<sup>45</sup> 12 Q. B. (Eng.) 217 (1848).

compositions, engravings, cuts, prints, photographs or negatives thereof, paintings, drawings, chromos, statuary, and models or designs intended to be perfected as works of the fine arts.<sup>46</sup> Articles that are not subjects of copyright under the United States copyright law are: Advertisements, advertising devices, advertising novelties, blank agreements, blank cards, blank forms, blank price lists, book covers, bonds, borders, buttons, business names, contracts, coupons or coupon systems, cuts for advertisements, cuts for articles of advertisements, devices, decorative articles, dollar advertisements, drafts, emblems, engravings of manufactured articles, envelopes, flags, ideas, labels, letter heads, mechanical devices, memorandum books, mere words, names, or phrases, business names, coined names, names of articles, names of companies, names of corporations, names of products, note headings, promissory notes, novelties, pass books, patterns, postal cards, record books, signs, stamps, systems, tablets, tickets of any kind, titles as such, titles of newspapers, titles of series, trade-marks, or wrappers for articles to be sold.

In England, the subjects of copyright are books, musical compositions, dramatic pieces, lectures, engravings and works of the same kind, paintings, drawings and photographs, and sculpture. As in the United States, the author, or his assignee, of any dramatic or musical composition has the sole liberty of publicly performing or representing it, or causing it to be performed or represented by others, unless it have been previously published in book form, in which case no such exclusive right exists. Unlike the copyright law of the United States, an English author does not have the exclusive right to dramatize his work. It is held that a public representation of a dramatic composition constructed out of a novel is not an infringement of the copyright of the author or his assignees, so long as the production is not printed and published in book form. This results from the difference which exists between books and dramatic or musical works. While in books there is only one copyright,

<sup>46</sup> U. S. R. S. 4,952.

in musical and dramatic works there are two, namely, the right of printed publication and the right of public performance. Many plays and musical compositions are publicly performed without being published in the form of books. However, it has been proposed in England to reserve the right of dramatizing a novel or other work exclusively to the author, and thus assimilate the law to that of the United States and France, where the author's right in this respect is fully protected."

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#### DURATION OF COPYRIGHT

**14.** In the United States, by the act of 1870 (which has not been changed in this particular by the act of 1891), the privilege of copyright endures for the period of twenty-eight years, and, if the author or his widow or children be living at the expiration of that time, then for the further period of fourteen years, making forty-two years in all. If the author die before the expiration of the first term, leaving neither widow nor children, the copyright of his work is limited to twenty-eight years.

In England, the term of copyright in books, and in printed and published dramatic pieces and music, is forty-two years from the date of publication, or for the life of the author and seven years afterwards, whichever term may be the longer; and there is now pending a bill to extend the copyright to thirty years after the death of the author, which is the law in Germany; while in Russia and France the copyright endures for the life of the author and fifty years after. If the publication take place after the author's death, the proprietor of the author's manuscript, or his assigns, have copyright in his book for forty-two years from its first publication. The term of copyright in one lecture printed and published is eight years, or the life of the author, whichever term is the longer; though the copyright on a book containing a collection of lectures is the same as the copyright on any other book. The term of copyright on engravings is

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<sup>47</sup> Rep. Roy. Copyr. Com., 1878, Art. 14.

twenty-eight years from the date of publication; on paintings, the period of the artist's life and seven years thereafter;<sup>48</sup> and on sculpture, fourteen years from the first "putting forth or publishing," and fourteen years more if the sculptor be living at the end of the first term.<sup>49</sup> In Canada, the term of copyright is forty-two years from the date of publication.

#### WHO MAY COPYRIGHT

**15.** In the United States, under the act of 1891, the persons entitled to copyright are "the author, inventor, designer, or proprietor" of the things subject to copyright, and "the executors, administrators, or assigns of any such person." The privilege of copyright is extended to foreign as well as to resident authors, when the laws of the country of the foreign author accord to American authors substantially the same copyright privileges as are conferred upon their own authors. The act of March 2, 1895, provides that foreign authors, whose books have been first printed in the United States, and who have observed certain conditions and formalities as to the deposit of copies of their works, shall have the same exclusive rights as American authors.

An author, inventor, or designer, within the meaning of the law, is any person who produces an original work by the result of his own intellectual labor. The work need not be wholly original in all its form and substance. A work may give evidence of familiarity with some other production without forfeiting its right to be deemed original. Plagiarism, or literary theft, consists in taking passages from another's compositions and publishing them, either word for word or in substance, as one's own.<sup>50</sup> Any person may, by artistic selection, modification, or rearrangement of a former publication, produce an original work within the meaning of the copyright laws.<sup>51</sup> A familiar instance is the compilation in a new and original form, of material common to all writers.<sup>52</sup>

<sup>48</sup> Rep. Roy. Copyr. Com., Art. 21.

<sup>49</sup> *Ibid.*, Art. 20.

<sup>50</sup> Cent. Dict.

<sup>51</sup> 5 Blatchf. (U. S.) 87 (1862).

<sup>52</sup> 1 Story (U. S.) 11 (1839).



The word proprietor has a larger meaning. An author, inventor, or designer, or his assignee, may be the proprietor of a work, but a proprietor of a work is not necessarily the author, inventor, or designer of it. A photographer, who photographs a person with the understanding that the latter is to have as many copies as he pleases, free of charge, to do with them as he likes, is the real proprietor of the photograph, and is entitled to secure a copyright therein.<sup>53</sup> A person who employs another for the express purpose of preparing a work for him, is the proprietor of the production and alone entitled to copyright, and not the author of the article.<sup>54</sup> Such writer cannot, from the same knowledge, learning, and ideas, and from sources which formerly enabled him to produce and write the book, write a similar book for a later proprietor.

In England, the right to copyright is conferred upon the author, or the owner or the proprietor, or his assigns, for any of the works entitled to copyright. In Canada, copyright may be secured by the citizens of any country which grants copyright to citizens of the British Empire.

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### PROCEEDINGS TO OBTAIN COPYRIGHT

**16. In the United States.**—By the revised statutes of the United States, at present in force, no copyright can be obtained unless, on or before the day of publication, whether such publication be in this or any foreign country, the person applying therefor deliver at the office of the librarian of congress, or send through the mails, a printed (or typewritten) copy of the title of the book, picture, or writing, or description of the drawing or design, which he desires copyrighted; and also two complete copies of such book, picture, or writing, or, in case of a drawing or design, a photograph of the same of cabinet size. Such copies of books must be printed from type set in the United States, or from plates made therefrom. Manuscript is not received.

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<sup>53</sup> 59 Fed. Rep. 324 (1894).

<sup>54</sup> 27 Fed. Rep. 861 (1886).

The books must be from the best edition. Each volume of a book in two or more volumes, when such volumes are published separately, and each number of a periodical shall be considered as an independent publication. Where photographs are sent, they must be from negatives made in the United States. Thereupon, on the day of its receipt, it is the duty of the librarian of congress to record the title of such copyright book, or other article, in a book to be kept for that purpose, together with the fact that the applicant claims copyright in the same. The copyright office is purely an office of record; it does not issue a copyright, but merely records a claim to copyright protection. A copy of such title or description, under the seal of the librarian of congress, may be had by the applicant at any time. It has been held that if the published title of a book be sufficient to identify the book with the title as copyrighted, there is no forfeit of the copyright because of an immaterial difference existing between the two titles. Blank forms of application for a copyright are furnished to applicants on request, and without charge.

The application for a copyright, the separately printed or typewritten copy of the title, the registration fee, and the two copies of the work, should, whenever possible, be sent in one parcel. Great care should be taken to send the required title or description of the work, as well as two copies thereof for record, before the publication or distribution of any copies of the article which it is desired to copyright. The law is explicit on these points. Return postage should not be enclosed, since all mail matter sent from the copyright office addressed to any part of the United States, including Alaska, Canada, and Mexico, is carried without postage under government frank. All correspondence should be addressed: "The Librarian of Congress, Copyright Office, Washington, D. C."

**17.** Each number of a newspaper should be entered by its title, distinguished by a statement of the volume, number, and date of issue. The title page for the different numbers

for a year can be printed with a heading written in as to the volume, number, and date, and should precede the publication. Two copies of each issue should be sent to the librarian of congress at the earliest moment after printing. This will require payment of a separate fee for each title filed.

Notice of copyright in the case of magazine articles is generally placed on the title page, or the page immediately following it; also at the top of each article; also at the top or foot of the first page of the reading matter; and where authors reserve the right of copyright of their own articles, such notice of reservation is printed at the beginning of the article or foot of the first page on which the article commences. This is necessary for the reason that after the volume is completed, in binding the numbers in book form it is usual to destroy the covers and advertisements and bind the reading matter only, and, if no notice of copyright were printed on the first page of each number, they might be bound by various parties holding them without any notice of copyright appearing in them.

In the case of newspapers, the notice of copyright usually precedes the article copyrighted, or intended to be. Where it is impracticable to send a title page, the sending of three copies of the book, magazine or periodical, or newspaper, is held to be a compliance with the law, as one can be used for a title page and the other two for the book, magazine, periodical, or newspaper required by the copyright law to be deposited.

The failure to deliver, or deposit in the mails, either of the published copies, or description, or photograph, required as aforesaid, exposes the proprietor of the copyright to a penalty of twenty-five dollars, to be recovered by the librarian, in the name of the United States, in an action of debt. A person who mails his copyright book, title, or other article, is entitled, upon request, to have a receipt for it from the postmaster, whose duty it then becomes to mail it to its destination at Washington. The following is the form of receipt given by the postmaster:

RECEIVED \_\_\_\_\_ of

INTERNATIONAL TEXTBOOK COMPANY,  
SCRANTON, PA.,

TWO COPIES OF A \_\_\_\_\_

ENTITLED \_\_\_\_\_

The copyright whereof it claims as proprietors in conformity with the laws of the United States relating to copyrights, and I have this day mailed the same to the librarian of congress, as provided by law.

No. of receipt of  
librarian of con-  
gress for the title  
page.

Date \_\_\_\_\_

\_\_\_\_\_  
Postmaster at Scranton, Pa.

18. Notice of copyright is required to be inserted on the title page of a copyrighted book, or on the page immediately following, in the words: "Entered according to the act of Congress, in the year \_\_\_\_\_, by \_\_\_\_\_, in the office of the Librarian of Congress, at Washington," or in the words, "Copyright, 19\_\_\_\_, by \_\_\_\_\_." Where the article is a map, chart, musical composition, painting, model, or the like, like words must be inscribed or impressed upon some visible portion of such article. The act of March 3, 1897, imposes a penalty of one hundred dollars upon any person who inserts or impresses such words upon any book or other article which has not been copyrighted, or who sells or imports any work bearing such an entry, which has not been copyrighted in the United States. The importation of such foreign books may be restrained by injunction.

In the case of subsequent editions of the work, wherein substantial changes have been made, it is the duty of the holder of the copyright to reforward to the librarian a copy of every such subsequent edition. In the case of books published in more than one volume, or of periodicals published in numbers, or of engravings, photographs, or other

articles published with variations, a copyright must be entered for each volume or part of a book, or number of a periodical, or variety, as to style, title, or inscription, of any other article. To complete the copyright on a book published serially in a periodical, two copies of each serial part, as well as of the completed work, if separately published, must be deposited.

Copyright may be secured for a projected as well as for a completed work, but no provision is made by the law for the filing of a *caveat*, as in the case of patents. The time when the copyrighted work must be published is not expressly defined by law, but the courts have held that it should take place within a reasonable time.

Application for a renewal of a copyright must be filed six months before the expiration of the first term, accompanied by a printed title, two copies of the work, and the fee, and a statement of the date and place of the entry of the original copyright. Where the author himself applies for the renewal, a distinct averment of his ownership of the copyright must accompany the application. Where the application is by his widow or children, the relationship of the parties to the author must be given. Within two months from the date of the renewal, a copy of the record thereof must be published in an American newspaper for the period of four weeks.

**19. In England.**—Copyright in England is created by statute, but, unlike the formality in the United States, does not depend on registration, which is permissive only, and not compulsory. There is kept, at Stationers' Hall, Ludgate Hill, London, E. C., a book of registry in which, to entitle the proprietor of any copyrighted book, or dramatic or musical composition, to maintain an action for an infringement of his copyright, there must be entered by an officer called the registrar of copyright, the title of the book or composition, the name and residence of the author or proprietor, the name of the publisher and the place of publication, and the date of the first publication of the work. Publication



must precede registration, and the date of publication is the date when the work is ready for sale. Upon the payment of a fee of five shillings, sealed and certified copies of such entry may be obtained, which have the effect of *prima facie* proof of the matters therein alleged.

The proprietor of the copyright in an encyclopedia, review, magazine, periodical, or other work, published in a series of books or parts, is entitled to all the benefits of registration upon his registering the first volume, number, or part. In the case of newspapers, registration should also be made at Somerset House, pursuant to the Newspaper Libel and Registration Act of 1881. Forms for such registration may be obtained by addressing: "The Registrar, Companies' Registration Office, Somerset House, London, W. C."

Proprietors of copyright in musical compositions desirous of retaining the right of public representation or performance of the same, must print on the title page of every copy a notice to the effect that all such rights are reserved. No registration of a dramatic piece or composition can be effected until after the date of the first representation or performance.

A copy of every book published in any part of the British dominions must be delivered, upon penalty of five pounds, at the British museum within a month after its publication if published in London, within three months if published elsewhere within the United Kingdom, and within twelve months if published elsewhere within the British dominions. Upon demand made, additional copies must also be delivered for distribution to Cambridge University, the Bodleian Library at Oxford, the Advocates Library at Edinburgh, and the Library of Trinity College at Dublin.

There is also maintained at Stationers' Hall a book entitled "Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," in which must be entered much the same information as in the case of books, with the addition of a short description of the nature and subject of the work, and a sketch, outline, or photograph of the same.

There exists in England no corresponding system for the registration of copyright in lectures or engravings. Sculpture is registered under arrangements made by the commissioners of patents.

**20. In Canada.**—All communications respecting copyright in Canada should be addressed: "Minister of Agriculture, Copyright Branch, Ottawa, Canada." There is no necessity for any personal appearance at the department, every transaction being carried on in writing. Blank application forms for copyright may be had by addressing the minister of agriculture, as above. Books of registry for copyrights are kept at the department, wherein the proprietors of literary, scientific, and artistic works or compositions may have the same registered. Every book not originating in Canada must be registered in Ottawa simultaneously with its registration in the country of its origin. Three copies of the copyrighted book or work of art must be delivered at Ottawa.

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### CONDITIONS GOVERNING COPYRIGHT

**21. In the United States.**—In the United States, by the act of 1891, it is made a condition that all the editions of works copyrighted in the United States must be entirely manufactured within the United States, both as respects the setting of the type and as to the printing and binding of the work. This provision in the law was made at the solicitation of the Typographical Union, who were apprehensive, if copyright were allowed without such a condition, that a large part of the book-manufacturing business of the United States would be transferred to foreign countries. It follows that foreign periodicals, of which there are no American editions printed from type set in the United States, cannot have their contents copyrighted in the United States.

It is a further condition that the date of the publication of every work copyrighted in the United States, whether the author be a resident or non-resident, must be not later than the date of its publication in this or in any foreign country.

If an English author secure a copyright in the United States for a publication, some portion of the contents of which has previously appeared in an English magazine, the copyright thus secured will afford no protection against a reprint of the portion previously published in the magazine; and, if the entire publication have previously appeared in a foreign periodical, the American copyright secured under such circumstances would probably be *ipso facto* forfeited. The purpose of such legislation is evident. If a foreign author, having secured copyright in his own country, were allowed time for extending his copyright in the United States, the importation of his works to this country, pending such period, must be either permitted or prohibited. In Canada, a work securing Canadian copyright must be printed in that country, but the importation of plates is permitted. If permitted in the United States, that country might not only be flooded with foreign editions of the work before an American edition was in readiness, one result of which would be a diminution in the market value of any American copyright, but there might be thrown upon the market a host of unauthorized editions, to the great financial prejudice not only of the foreign authors themselves, but of legitimate American publishers engaged in the business of reprinting the works of foreign authors. On the other hand, if the importation of the foreign work were prohibited, the American reading public might, for an indefinite period, be without facilities for securing any copies of a foreign production, however new, interesting, or important.

**22.** The same rule applies to the prior publication in the United States, in serial form, of an article subsequently presented in its complete manuscript form, for copyright at Washington, even though the work has not yet been published in bound form. The law which requires that the date of registration must be contemporaneous with the date of publication expressly refers to a publication as well in this country as in a foreign country. This rule was recently applied in the case of Oliver Wendell Holmes' well-known

work, entitled "The Autocrat of the Breakfast Table." Dr. Holmes first printed this work in serial form in twelve successive numbers of *The Atlantic Monthly*, during the years 1857 and 1858. No copyright of the article was secured either by the author or by the publisher of the magazine, but at the close of the year 1858, after the completion of the publication of the article in its serial form, Dr. Holmes deposited for record a printed copy of the title of the book in the district court of his domicile, and shortly afterwards issued the work in bound form, a copy of which was delivered to the clerk of the district court in compliance with the copyright act of 1831. Thereafter, the words "Entered according to Act of Congress, 1858, by Oliver Wendell Holmes, in the Clerk's Office of the District Court of the District of Massachusetts," were printed in all subsequent editions of the work. In 1886, Dr. Holmes recorded the title of his work a second time by sending a printed copy of the title to the librarian of congress, and in all subsequent editions of the work the words appeared: "Copyright, 1886, by Oliver Wendell Holmes." Meanwhile, since the year 1894, a certain publishing house sold "The Autocrat of the Breakfast Table," their work having been copied from the twelve numbers of *The Atlantic Monthly* as they were originally published. Upon each book as sold was printed a notice that it had been taken from *The Atlantic Monthly*. The executors of Dr. Holmes filed a bill to restrain these publishers from printing the work, alleging infringement of the copyright of Dr. Holmes. The bill was dismissed upon the ground that an author who permits his intellectual productions to be published, either serially or collectively, forfeits his right to a copyright as effectually as an inventor forfeits his right to a patent who deliberately abandons his invention to the public.<sup>55</sup>

23. The act of 1891 prohibits, during the existence of the American copyright, the importation of editions of any foreign work copyrighted in the United States, irrespective

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<sup>55</sup> 80 Fed. Rep. 514 (1897).

of whether the author were a resident or non-resident. In order, however, that buyers of foreign books, which have been copyrighted in the United States, may have the opportunity of securing the foreign editions of such books, it is provided by the act that there may be an importation of such books not exceeding two copies in any one shipment. For the purpose of enforcing the prohibition against the importation of editions of the books, the librarian of congress is required to prepare weekly lists of all books and other articles copyrighted, and send the same to the secretary of the treasury, to be by him forwarded to the customs officers of the United States, and to the postmasters of all post-offices receiving foreign mails. Any person desiring copies of such weekly lists may procure them at a sum not exceeding five dollars a year from the treasury department.

There is no prohibition against the importation of foreign periodicals of which there are no American editions printed from type set in the United States, except as to such numbers of the same as contain unauthorized reprints of matter already copyrighted in the United States; nor is there any prohibition against the importation of an edition of a book printed in a different language from that in which it was originally copyrighted in the United States. For example, Edmond Rostand's recent book, entitled "*L'Aiglon*," was copyrighted, in its original French version, in the United States, so that both a French and an American copyright existed in the work. The two copies of the American "*L'Aiglon*" required to be deposited in the library of congress were printed from type set within the United States. A certain rival publishing house in New York subsequently began the importation into the United States of editions of "*L'Aiglon*," printed abroad in the French language from type not set within the limits of the United States. Upon complaint to the attorney-general of the United States, directions were given for prohibiting the further importation of such editions. The act of 1891 was held to forbid the importation of editions of a book in the foreign original language in which the American copyright



was secured, though its provisions would not extend to the prohibition of importations of a French work in, for example, a Spanish or German version.<sup>56</sup>

What has been said heretofore of books or other publications applies with equal force, under the act of 1891, to works of art. All reproductions in the form of photographs, chromos, or lithographs, to fall within the privilege of copyright, must be reproduced in the United States. With respect to the finer and more artistic forms of reproductions, however, such as engravings or photogravures, and also as respects musical compositions, the law does not exact the condition of American manufacture, an exemption which has met with much favor from the artists and art publishers of Europe who have suffered severely in the past from American appropriations of their productions.

**24. In England.**—As in the United States, every book, in order to secure an English copyright, must be published within the United Kingdom, but the type need not be set up, nor the books printed, within the United Kingdom. In the United States, publication follows the deposit of the books copyrighted in the office of the librarian of congress. In England, the date of publication is the date of sale, and such publication must always precede registration. It is not necessary to file a copy of the title page prior to filing the demand for registration, as is required in the United States. A person desiring to copyright in England must expose for sale and sell, by an English publisher, two copies of his book. Registration at Stationers' Hall then follows.

Every applicant for an English copyright must be either a natural-born or naturalized British subject, or reside, at the time of the publication of the book, somewhere within British dominions; although it is believed that an alien friend, who first publishes his book in the United Kingdom, acquires the right to copyright, notwithstanding the fact of non-residence.<sup>57</sup>

The fact of publication in England is not sufficient to entitle the book to copyright. It must not have been

<sup>56</sup> Opinion of the Atty.-Gen. of the U. S.,  
Jan. 19, 1901.

<sup>57</sup> Rep. Roy. Copyr. Com., 1878, Art. 6.

previously published by the author in any other country; but, as in the United States, the contemporaneous publication of the work in England and in a foreign country forms no barrier to securing an English copyright. The law appears to be unsettled whether the prior publication of the work in parts of British dominions outside of the United Kingdom disentitle the author to copyright on a subsequent publication within the United Kingdom.<sup>58</sup>

**25. In Canada.**—To secure copyright in Canada, the work need not be set up in type in the dominion, but must be printed there, and the importation of plates (prohibited in the United States) is permitted. The type may be set up in any other country, and sent in forms of electrotype plates to Canada, for printing and binding. The foreign publisher may either have a resident agent in Canada, or make his arrangements with a Canadian publisher and have his name attached to the books as publisher. Every book, not originating in Canada, must be registered in Ottawa simultaneously with its registration in the country of its origin. Sixty days after such registration, a Canadian edition of the work must be produced. From the date of registration, the importation of foreign copies of the work is prohibited, except that British editions may be imported up to the time when the Canadian edition is ready.

The notice of Canadian copyright must be printed on the title page or the page immediately following. If it be a book, the words "Entered according to Act of Parliament of Canada, in the year——, by——, at the Department of Agriculture." On the title page of the book should be printed the names of the publishers in England, the United States, and Canada. If it be a map, chart, musical composition, print, cut, engraving, or photograph, that is copyrighted, the copyright notice should appear on the face of it. If it be a volume of maps, charts, musical compositions, engravings, or photographs, the notice should be printed on the title page of the frontispiece.

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<sup>58</sup> Rep. Roy. Copyr. Com., 1878, Art. 7.

A bill has recently been introduced which provides that, where a copyrighted book has been first published within the British dominions but outside of Canada, and the owner has granted a license for its reprint in Canada, the minister of agriculture may prohibit the importation of any foreign copies of the book (other than two copies for library, college, or university use), except where the written consent of the licensee is obtained for such importation. Provision is made for revoking this prohibition in cases where the Canadian license to reprint expires, or where an insufficient number of the books are reprinted to meet the demand, or where the book is unsatisfactorily printed, or where any other state of affairs exists rendering importation necessary on public grounds. The holder of any license to reprint books the importation of which has been prohibited, is required, upon demand, to import and sell a copy of any edition of such book then on sale and reasonably obtainable in the United Kingdom or any other part of his majesty's dominions, at the ordinary selling price of such copy, reasonable forwarding charges, and the duty, added.

The failure of a licensee to supply such a copy within a reasonable time affords just ground for revoking or suspending the prohibition against importation. All books imported in violation of the provisions of this bill are to be seized and destroyed by any officer of customs, and any importer of such books is liable to a penalty not exceeding one hundred dollars for every infraction of the law.

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## INFRINGEMENT OF COPYRIGHT

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### RIGHTS AND REMEDIES

**26.** In the United States, if any unauthorized person print, publish, dramatize, translate, import, or sell any book which has been duly copyrighted, he is required to forfeit every such copy to the proprietor of the copyright, and to pay such damages as may be recovered against him. The penalty for engraving, printing, dramatizing, importing, or

selling any map, chart, dramatic or musical composition, print, cut, engraving, photograph, chromo, or description of any painting, drawing, statue, statuary, or model or design intended for the fine arts, is a forfeiture to the true proprietor of all the plates on which the same is copied, and every sheet thereof, and of the sum of one dollar for every sheet found in his possession. In the case of a painting, statue, or statuary, the forfeiture is ten dollars for every copy found in his possession or offered for sale, one-half of the forfeiture to go to the proprietor and the other half to the government. In the case of photographs made from an object not a work of fine art, the sum to be recovered for an infringement is not less than one hundred dollars nor more than five thousand dollars. The sum to be recovered for an infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model, or design for a work of the fine arts, or of a photograph of a work of the fine arts, is not less than two hundred and fifty dollars nor more than ten thousand dollars.<sup>59</sup> One-half of the foregoing penalties goes to the proprietors of the copyright, and the other half to the use of the government.<sup>60</sup>

The unauthorized public performance of any dramatic composition entitles the proprietor to damages in a sum not less than one hundred dollars for the first, and fifty dollars for every subsequent performance, besides subjecting the performer to criminal prosecution and imprisonment.<sup>61</sup> All suits or actions in any case of forfeiture or penalty under the copyright laws, must be commenced within two years after the cause of action has arisen.<sup>62</sup>

In addition to these remedies, the circuit and district courts of the United States are empowered to grant injunctions in proper cases to restrain the infringement of a copyright.<sup>63</sup> Where an injunction is awarded, it carries with it the right to an accounting of all profits realized from infringement;<sup>64</sup> but an injunction will be issued, even without proof of

<sup>59</sup> U. S. R. S., Sec. 4,964.

<sup>60</sup> *Ibid.*, Sec. 4,965.

<sup>61</sup> *Ibid.*, Sec. 4,966.

<sup>62</sup> *Ibid.*, Sec. 4,968.

<sup>63</sup> *Ibid.*, Sec. 4,970.

<sup>64</sup> 38 Fed. Rep. 846 (1889).

actual damages, if there have been a positive infringement of a copyright.<sup>65</sup> An injunction is seldom issued in advance of the actual publication of the offending work.<sup>66</sup>

**27.** In England, every person is liable to an action for damages who without authority prints or causes to be printed, for sale or exportation, any copyrighted book; or imports for sale or hire from beyond seas any such unlawfully printed book; or knowingly sells any book so unlawfully printed or imported. The owner of the copyright must commence his action within twelve months after the commission of the offense. In addition, every person who without authority imports into the British dominions, for sale or hire, a copyrighted book first composed, printed, and published in the United Kingdom and reprinted in any country outside the British dominions, is subjected to the penalty of forfeiting every such book (and the officer of customs or excise is authorized to seize and destroy the same), and upon conviction must pay a fine of ten pounds for every such offense, and double the value of every copy found in his possession.

The penalty for unlawfully performing dramatic compositions is forty shillings for every performance, or the full amount of the proceeds realized from such performance, or the full injury or loss sustained by the owner of the copyright, whichever may be the greater damage. The penalty for infringing the copyright in any painting, drawing, or photograph is, in general, a fine of ten pounds, or, in proper cases, double the price at which the articles were offered for sale.

The penalties mentioned above are cumulative, and the person aggrieved may, in addition to the penalties, recover damages, and also enforce the delivery to him of the offending articles, or recover damages for their retention or conversion. Provision is made for the punishment of any person who pirates lectures, prints, or engravings, and for the forfeiture of all such unauthorized copies.

<sup>65</sup> 19 Fed. Rep. 325 (1884).

<sup>66</sup> 14 Fed. Rep. 849 (1888).



## WHAT CONSTITUTES INFRINGEMENT

28. A copyright is infringed when the whole or any material part of the copyrighted work is purloined and published without the consent of the owner. The essence of infringement is publication. It is not infringement to publicly read or recite the whole or any part of a copyrighted book.<sup>67</sup> The act consists in the dissemination of copies of what has been copyrighted. There need not necessarily be the intent to derive profit from such publication, and hence the gratuitous distribution of the offending work is just as objectionable to the copyright law as a distribution for the purposes of sale.<sup>68</sup>

No precise rule can be laid down as to how much or how little of a copyrighted production may be used in order to constitute an infringement of the work. The usual test is to inquire, in each case, whether the value of the original production have been sensibly diminished by the act complained of, either because the offending work may serve as a substitute for it, or because the selling qualities of the original production may be impaired by the material taken from it.<sup>69</sup> In such a case, it is no defense that the offender, by the use of quotation marks, sought to evince the idea that the material used was the work of some one other than himself. Every writer has the right to make use of extracts and quotations from the works of others, but the law exacts the condition that it must be done in the legitimate exercise of a mental exertion on his part deserving the character of an original work.<sup>70</sup> Even where a fair acknowledgment is made of the source from which the extracts have been taken, a liability for infringement may be incurred where the extracts exceed the point (regard being had to their extent and materiality) where injury to the author whose thoughts and language are thus taken may be perceived.<sup>71</sup> This results from the consideration that it was the "writings of

<sup>67</sup> 25 Fed. Rep. 183 (1885).

<sup>68</sup> 74 E. C. L. (Eng.) 177 (1852).

<sup>69</sup> 1 Story (U. S.) 11 (1839).

<sup>70</sup> 46 Albany L. J. 350 (1892).

<sup>71</sup> Curt. Copyr. 252.

authors" which congress, under the federal constitution, was authorized to protect, and it is to such authors only that the "sole liberty of printing, reprinting, publishing . . . vending" their writings was conferred by the legislation.<sup>72</sup>

No person would be guilty of infringing the copyright of a book who did not copy its words or imitate them so closely as to produce a virtual copy of the book. In the matter of making extracts or quotations, even when not acknowledged to be such, no liability would attach if, under all the circumstances of the case, such extracts appeared to be reasonable in number, length, and materiality, and to have been made for a proper and commendable purpose. Since, without copying, there can be no infringement of copyright, mere similarity between two writings or books does not in itself constitute the one an infringement of the other. Copyright differs in this respect from patent right, which admits of no use of the patented thing without the consent or license of the patentee. As has been shown, persons making, using, or vending to others to be used, the patented article, are guilty of infringement; but the recombination of a book without copying, though not likely to occur, would not be an infringement.<sup>73</sup>

**29.** Similarity and the use of prior publications, even to the copying of small parts, are permissible to some extent in such books as dictionaries, gazetteers, grammars, maps, arithmetics, almanacs, encyclopedias, itineraries, guide books, and similar works. There is no infringement of such publications if the main design and the general execution be novel and improved, and be not a cover for piracy. The test of piracy is not to ascertain whether a person have, in fact, used the plan, arrangements, and illustrations of another, as the model of his own book, with colorable alterations and variations, only to disguise the use thereof; or whether his work be the result of his own labor, skill, and use of common materials and common sources of knowledge open to all men, and the resemblances be either accidental

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<sup>72</sup> 38 Fed. Rep. 848 (1889).

<sup>73</sup> 4 Cliff. (U. S.) 80 (1869).

or arising from the nature of the subject; in other words, whether the labor be, as to the thing mentioned, a servile or evasive imitation of the work copied from, or a *bona fide* original compilation from other common or independent sources.<sup>74</sup>

As stated by an authority, an author "is entitled to use any information or materials which may be obtained from common sources, either published or unpublished. . . . There is no recognized principle which will prevent a subsequent compiler from copying common materials from an existing compilation, and arranging and combining them in a new form, or using them for a different purpose." Even though the compiler of a subsequent work avail himself to some extent of the labor and research of his predecessor in the sources open to all, instead of obtaining all the material from the original sources, he will not be an infringer. "The first compiler has no exclusive property in that of which he is not the author, and which may be used by any one. His copyright protects only his own arrangement of the materials which he has selected. . . . There is nothing in the law of copyright to prevent any person who has obtained common materials from the original sources from using them in substantially the same manner, and for the same purpose, as they have been previously used, provided the arrangement is his own, and is not servilely copied from the work of another."<sup>75</sup>

Applying the principles of the test of piracy to a case where a compiler of a directory was alleged to have infringed on another's previous copyrighted compilation, one may take the names and addresses from a previous publication of the same character and give them to his canvassers that they may make independent inquiry, but he may not use the names and addresses as a whole and simply cause them to be verified;<sup>76</sup> in other words, "the compiler of a general directory is not at liberty to copy any part, however small, of a previous directory, to save himself the

<sup>74</sup> 3 Story (U. S.) 793 (1845).

<sup>75</sup> Drone Copyr. 417, 424, 427.

<sup>76</sup> L. R. 5 Ch. (Eng.) 279 (1870); 15 Fed. Cas., No. 8,135 (1875).

trouble of collecting the materials from the original sources. Otherwise, as the matter of rival publications of this kind is identical, there would be practically no copyright in such a book.<sup>77</sup> However, a copyright secured by the compiler of a directory, guide book, road book, statistical table, and the like, does not confer on him a monopoly of the matter published; but a subsequent compiler must investigate for himself from the original sources of information which are open to all. The law of copyright only requires the subsequent compiler to do for himself that which the first compiler has done; the same sources of information are open to each.<sup>78</sup>

30. The essence of this principle permeates some of the other characters of copyrighted publications before mentioned. In the compilation of a dictionary, for instance, the compiler has no right to copy the arrangement of a previous work of the same character, but he may make use of the previous work as a source of information.<sup>79</sup> In an English case, it is held that in the case of a dictionary, map, guide book, or directory, where there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done.<sup>80</sup>

Where a map appears to have been substantially copied from a prior one, without alteration or revision, except in scale and color, there is clearly an infringement; but one map is not infringed by another simply because the later one is arranged substantially upon the same plan, especially if it do not delineate the same territory, nor convey the same information. Such was the case of two maps published for the use of those engaged in the business of fire insurance, both of which were arranged substantially on the same plan, but one represented one city, and the other, another.<sup>81</sup> In the case of a map of a newly discovered island, it was held that the

<sup>77</sup> 30 Fed. Rep. 772 (1887), by Wallace, J.

<sup>78</sup> *Ibid.*

<sup>79</sup> 41 Fed. Rep. 146 (1896).

<sup>80</sup> L. R. 1 Eq. (Eng.) 697 (1866).

<sup>81</sup> 99 U. S. 674 (1878).

compiler or a subsequent author of a map of the island must go through the whole process of triangulation, just as if he had not seen any former map, and, generally, he is not permitted to take one word of information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information, and the only use he can legitimately make of a previous publication is to verify his own calculations and results where obtained.<sup>82</sup>

**31.** The compiler of a digest of law reports has no monopoly of the opinions, decisions, and syllabi prepared by the courts and judges; even though he has previously published them in copyrighted pamphlets. These opinions, decisions, and syllabi are free alike to all digesters. But when notes suitable for use in a digest have been prepared from these common sources of information and properly secured by copyright, a subsequent compiler in the same field is not permitted to avail himself of this original work, and save time and labor for himself by copying from the property of others. He may use the copyrighted matter as a guide in the preparation of his own work to verify its accuracy or detect errors, omissions, or other faults, but in all other respects he must investigate for himself. He may take the original opinions and prepare from them his own notes, but he cannot exclusively and evasively use those already collected and embodied by the skill and industry and expenditures of another.<sup>83</sup>

As to the reports of law and equity cases, published, not in the form of a digest but in the form of state reports of cases in full, there has been much discussion as to whether, from considerations of public policy, they should be subjects of copyright. In the United States, it is held that such reports are not the subjects of copyright.<sup>84</sup> In a Connecticut case, however, the court upholds the right of the state to have such reports copyrighted, because "the judges and the

<sup>82</sup> L. R. 1 Eq. (Eng.) 697 (1866); 30 Fed. Rep. 773 (1887).

<sup>83</sup> 64 Fed. Rep. 364 (1894), citing 13 Blatchf. (U. S.) 163 (1875).

<sup>84</sup> 23 Fed. Rep. 143 (1885); 34 Fed. Rep. 319 (1888).



reporter are paid by the state, and the product of their mental labor is the property of the state."<sup>85</sup> To constitute an infringement of other subjects mentioned in the United States copyright law, the general rules, before stated, as to literal copying and colorable imitation of substantial part, or adoption of essential features and substance of the original, are applied according to the particular subject.<sup>86</sup>

There is much latitude allowed in copying from books, where the purpose is fair exposition, criticism, or for illustrating or enforcing the proposition of the text.<sup>87</sup> But it is not permissible to copy extracts from a book to such an extent that the publication may serve as a complete and substantial substitute for the work from which they are copied. If there be taken so great a quantity as to diminish the value of the original work, and the labors of the original author are appropriated to an injurious extent, it will be piracy.<sup>88</sup>

### ASSIGNMENT OF COPYRIGHT

**32.** Under the statutes of the United States, a copyright is assignable by any instrument in writing. Such an assignment must be recorded in the office of the librarian of congress within sixty days after its execution, otherwise it is void as against a subsequent purchaser or mortgagee for a valuable consideration without notice of the assignment.<sup>89</sup> In England, also, a copyright is assignable by an instrument in writing, and such assignment must be duly entered at Stationers' Hall, as in the case of an original copyright. The assignment may be of the whole, or of any undivided part of the copyright, and it is no objection that the assignee is a citizen of another country.<sup>90</sup>

The effect of an assignment on the assignor is not to prevent him from selling copies of the copyrighted article printed before the assignment and remaining unsold in his

<sup>85</sup> 53 Conn. 415 (1885).

<sup>86</sup> 33 Fed. Rep. 494 (1888); (1894) 3 Ch. (Eng.) 109.

<sup>87</sup> 26 Fed. Rep. 519 (1886); 8 L. J. Ch. (Eng.) 141 (1839); Kerr Inj. 364.

<sup>88</sup> L. R. 3 Eq. (Eng.) 718 (1867).

<sup>89</sup> U. S. R. S., Sec. 4,955.

<sup>90</sup> 56 Fed. Rep. 764 (1893)

possession; such stock the assignor may dispose of independently of the assignment.<sup>91</sup> By assignment, the assignor parts only with what he specifically agrees to transfer, be it an exclusive right of sale for a limited time of the whole work, or for all time, or an undivided part of the copyright, retaining an interest.

Under the provisions of the statute authorizing copyright to be taken out by the author or his "assigns," an assignment of the right to protect a manuscript by copyright may be made before the entry of copyright. The assignee of an unpublished work can secure a copyright in his own name as proprietor.<sup>92</sup> The form of an assignment of a copyright is regulated by statute;<sup>93</sup> but the form of an assignment of manuscript before copyright is obtained, and before publication, is regulated by the common law.<sup>94</sup>

Unless expressed in the written instrument, an assignment of a copyright for twenty-eight years includes only the copyright for that term, and not for the additional term; but, where the assignment of the manuscript is made before copyright is taken out, an absolute right to the renewal will vest in the assignee.<sup>95</sup>

To effect a valid assignment, the contract must be complete. It is held that there is no assignment where only an incomplete agreement is made, though a certain sum be paid as part consideration, with the understanding that a more definite contract is to be thereafter entered into and reduced to writing, and the owner afterwards refuse to comply with the terms of the incomplete agreement, and proceed to publish his work.<sup>96</sup> However, there may be a valid agreement by parol to assign at a future time, and the assignee will acquire an equitable title under the agreement.<sup>97</sup>

<sup>91</sup> L. R. 7 Eq. (Eng.) 418 (1869).

<sup>92</sup> 13 Wall. (U. S.) 608 (1871).

<sup>93</sup> U. S. R. S., Sec. 4,955.

<sup>94</sup> 2 Blatchf. (U. S.) 165 (1851).

<sup>95</sup> 5 McLean (U. S.) 328 (1852).

<sup>96</sup> 25 Fed. Rep. 188 (1885).

<sup>97</sup> 8 Wend. (N. Y.) 562 (1832); 7 C. B. (Eng.) 4 (1849).



# THE LAW OF PATENTS, COPYRIGHT, AND TRADE-MARKS

(PART 3)

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## TRADE-MARKS

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### DEFINITION AND NATURE

1. A **trade-mark** is a particular mark or symbol used for the purpose of denoting that the article to which it is affixed is sold or manufactured by the proprietor of it, or by his authority, or that he carries on business at a particular place.<sup>1</sup> Its office is to point out distinctly the origin or ownership of the article to which it is affixed, or, in other words, to give notice who was the producer.<sup>2</sup> It may consist of a name, a device, or a particular arrangement of words, lines, or figures, or any peculiar work or symbol.<sup>3</sup> It may be in any form of letters, words, vignettes, or ornamental design; and newly coined words may form a trade-mark.<sup>4</sup>

The term trade-mark cannot be applied to a mere label; it, however, may contain one, and may be the vehicle or embodiment of one. The object is to show the origin of the article. The general rule is against the use of mere words as a trade-mark; but an exception to this is where it indicates origin, ownership, or the maker. If it be of common use, indicating merely kind or quality, as, for instance, "superfine"

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<sup>1</sup> 35 L. J. Ch. (Eng.) 61 (1865).

<sup>2</sup> 138 U. S. 537 (1890).

<sup>3</sup> 86 Ky. 334 (1887); 44 N. Y. Super. 427 (1879).

<sup>4</sup> Browne Trade-Marks, Sec. 151.

or "first quality," as only descriptive of the nature of the article, or of a generic character, as hemp or cotton, it cannot be appropriated as a trade-mark. Such words are the common property of all men; they may be used truthfully by one man without infringing on another's right, or creating the possibility of the public being thereby deceived. Thus, the mark "A No. 1" on a firkin of butter, is a common one indicating its quality. A trade-mark must be specific; it must mark the goods of the manufacturer as his goods, and not as his in common with all other persons.<sup>5</sup>

**2. Geographical Names.**—If a geographical name be used as such, that is, the name of a district, country, or state, it cannot be protected as a trade-mark, as, for instance, if it be associated with a product to indicate its quality. All persons living in a town or city may use its name as an address, and many persons may make the same article in the same town, and show that it is so manufactured, by having the name of the place stamped upon it or printed upon the label or covering, as their address or place of business.\* There can be no exclusive appropriation of the name of a place to be used as a trade-mark for such a product as coal, for example. This was settled by the United States supreme court in a case where certain persons claimed the right to the exclusive use of the words "Lackawanna Coal," as a distinctive name or trade-mark for the coal mined and transported to market by them. The court stated the doctrine of all the authorities to be that "words or devices may be adopted as trade-marks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others. Property in a trade-mark, or rather in the use of a trade-mark or a name, has very little analogy to that which exists in copyrights or in patents for inventions. Words in common use, with some exceptions, may be adopted, if at the time of their adoption they were not employed to designate

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<sup>5</sup> 86 Ky. 334 (1887); 35 Conn. 402 (1868); 54 Fed. Rep. 175 (1893).

<sup>6</sup> 86 Ky. 345 (1887).



the same or like articles of production. . . . But, though it is not necessary that the word adopted as a trade name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief."<sup>7</sup> With due regard for these principles, the court, in affirming the circuit court which held that the complainants could have no exclusive right in the name "Lackawanna Coal," said: "The description does not point to its origin and ownership, nor indicate in the slightest degree the person, natural or artificial, who mined the coal or brought it to market. All the coal taken from that region has been known for years as Lackawanna coal. . . . We are, therefore, of the opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim."<sup>8</sup>

A word may be considered merely geographical, or a denomination of fancy, according to circumstances,<sup>9</sup> upon which each case must turn. Evidently a distinction should be drawn between the use of a geographical name, indicating the particular manufacture of a certain person, and its use in describing a natural product of a particular locality, possessing qualities depending on the place.<sup>10</sup> The name of the place where an article is manufactured does not serve to indicate its quality or composition; and where the manufacturer has given it a geographical name, which he was the first to use in connection with the article, it may acquire a secondary meaning from long use in such connection, and instead of designating the place where the article is made, indicate its origin, or that it is the product of a particular manufacturer, or made according to his method.<sup>11</sup>

<sup>7</sup> 13 Wall. (U. S.) 311-328 (1872).

<sup>8</sup> *Ibid.*

<sup>9</sup> Browne Trade-Marks, Sec. 192.

<sup>10</sup> 86 Ky. 349 (1887).

<sup>11</sup> *Ibid.*, 347.

In England, the rule is: If it appear to the court that the geographical name used as a trade-mark has by long use acquired a secondary meaning, which causes it to indicate to the public, not only the locality where the goods are manufactured, but also their ownership and their origin, the name will constitute a valid trade-mark, the defendant being permitted to state the origin of his goods in such a manner as to avoid, as far as possible, all danger of deceiving the public and causing them to buy his goods as and for those of the first user.<sup>12</sup>

**3. Fictitious Names and Numerals.**—A trade-mark may consist of a fictitious name, as that of a famous person or thing, or some character or thing of fiction; as where a manufacturer of cotton cloth stamped it with the words "Roger Williams Long Cloth," or where a manufacturer of paper collars stamped them "Bismarck." And numerals, if employed arbitrarily to indicate ownership, and not grade or quality, will be valid trade-marks.<sup>13</sup> Thus, where the manufacturers of homeopathic remedies employed the numerals "1" to "35" to certain medicines and applying to a particular disease or class of diseases, and it appeared that the medicines were frequently purchased by the numbers alone, the manufacturer was protected in their use.<sup>14</sup>

**4. Devices and Symbols.**—The most usual forms of trade-marks are devices or symbols. As before stated, the office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed. This may, in many cases, be done by a name, mark, or a device well known, but not applied to the same article.<sup>15</sup> Generally, any device or symbol may be protected as a trade-mark which is arbitrary in its character and selection, and does not, by its inherent character, necessarily describe the goods on which it is employed or contain any misrepresentations of fact with reference to the goods, their origin, character, qualities, or

<sup>12</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, p. 332.      <sup>14</sup> 14 Fed. Rep. 250 (1882).

Vol. 26, p. 332.

<sup>15</sup> 13 Wall. (U. S.) 311-328 (1872).

<sup>13</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, pp. 248, 255, citing 78 Am. Dec. 452 (1860); 138 U. S. 537 (1890).

contents. Examples of such trade-marks are: "Warren Hose Supporter," with a cut of the garter; a six-pointed star, with the word "Star" as a trade-mark for underwear; a picture of a boy suffering with cramps, with the words "Cramp Cure"; the device of a golden fleece, with the words "Pure Old Scotch Whisky"; an elk's head, with the word "Elk" and the initials of the manufacturer.<sup>16</sup>

**5. Trade Names.**—Though not strictly trade-marks, **trade names**, such as the name of a firm, a corporate name, and the name of a publication, are nevertheless species of property of the same nature, and will be protected in like manner.<sup>17</sup> The distinction between trade names and trade-marks is: A trade-mark owes its existence to the fact that it is affixed to a commodity; a trade name is more properly allied to the good-will of a business.<sup>18</sup> A trade-mark usually relates to the thing sold, while, in addition to this, a trade name usually involves the source from which it comes, the individuality of the maker, both for protection in trade and avoiding confusion in business affairs, as well as for securing to him the advantage of any good reputation which may have been gained. The law of trade-marks is designed chiefly for the protection of the public from imposition; that of trade names for the protection of the party entitled to it.<sup>19</sup> The name of a newspaper is a trade-mark, as much so as a label on a bale of muslin.<sup>20</sup> The name of a publication may be protected as a trade-mark, but not if the publication to which it is applied has been copyrighted and the copyright has expired.<sup>21</sup> As to publications generally, the title or name is an appendage to the published subject for which a copyright is taken out, and, if the latter fail to be protected, the title goes with it, as certainly as the principal carries with it the incident.<sup>22</sup>

Trade names applied to business stands that are arbitrary or personal become the personal property of the first adopter

<sup>16</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, p. 250, citing 2 Ch. Div. (Eng.) 434 (1875); 51 Fed. Rep. 829 (1892); 42 Fed. Rep. 408 (1890); 41 Ch. Div. (Eng.) 278 (1889); 37 Fed. Rep. 359 (1889).

<sup>17</sup> 33 Am. Rep. 335 (1878).

<sup>18</sup> Browne Trade-Marks, Sec. 91.

<sup>19</sup> 43 L. R. A. 95 (1898).

<sup>20</sup> 2 Brew. (Pa.) 321 (1869).

<sup>21</sup> 47 Fed. Rep. 411 (1891).

<sup>22</sup> 1 Blatchf. (U. S.) 627 (1850).

and may be transferred by him from one location to another, or sold with his business, independent of the location where it is conducted; but, if the name be local, that is, if it derive its origin from any local peculiarity or purpose or use of a particular building, it becomes inseparably part of the building, and will pass with a sale or lease of it, and cannot be severed from the building even by its first adopter and user. Where several parties carried on business under a firm name, adding "Established 1780," and one sold out the good-will of the business to the others, and then established another store, using the words "Established 1780," he was enjoined from using the words. The court said: "The exclusive enjoyment of such use is valuable, as a species of trade-mark, to the continuers of that business, as the exclusive enjoyment of a trade-mark upon a well-known article is valuable to the manufacturer thereof."<sup>23</sup>

A corporation will be protected in the exclusive possession and use of its corporate name. State authorities will ordinarily not grant a charter to a new corporation under the name of an existing corporation.<sup>24</sup> Where a foreign corporation carries on its business under a name, in fact the same as or nearly identical with that of a domestic corporation, it will be enjoined, however different its name might be. The public is misled and the domestic corporation suffers from the action of the foreign corporation in doing business under a similar name.<sup>25</sup>

**6. Invalid Trade-Marks.**—As we have seen, a general name, or a name merely descriptive of an article of trade, of its qualities, ingredients, and characteristics, cannot as a rule be employed as a trade-mark, so as to entitle the person who employs it to protection; nor can one claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. The

<sup>23</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, pp. 280, 281, citing 9 Ch. Div. (Eng.) 176 (1878); 57 How. Pr. (N. Y.) 1 (1879).

<sup>24</sup> Bouv. Law Dict.; 14 W. N. C. (Pa.) 31 (1883).

<sup>25</sup> 10 L. R. A. 758 (1891).

phrase "Syrup of Figs," therefore, constitutes a valid trade-mark, as not being in any source a general term. It is not a name of a natural product, or of a class of natural products. It is the result of a manufacturing process, and produced by the person who, in applying the name to an artificial product, is safe in the protection of the use of that name as a trade-mark.<sup>26</sup>

In the long list of words and phrases that cannot be monopolized and protected as trade-marks, under the law, because they are descriptive of the goods or business are: "Tycoon," applied to tea;<sup>27</sup> "Taffy Tolu," applied to chewing gum;<sup>28</sup> "The Antiquarian Book Store," as being merely descriptive of the class of books sold;<sup>29</sup> "Satinine," applied to starch and blue;<sup>30</sup> "Nourishing Stout," on labels attached to bottles containing that liquor, as denoting quality;<sup>31</sup> "International Banking Company," which is descriptive of the business.<sup>32</sup>

There are, however, a few exceptions to the rule that words denoting quality cannot be monopolized and protected as trade-marks. A notable case is that of "Asepsin," indicating the antiseptic qualities of a salt obtained from wintergreen. It was held that the word being a new invention was not invalid as a trade-mark because it suggested quality. The reasons upon which this departure from the general rule is grounded are stated by an authority to be that, though a name is thoroughly descriptive, having become so by long use and association with goods of a particular kind, still the trade-mark will be protected because it would be the height of injustice to an honest trader who, by the expenditure of his time, labor, and money had so widely extended the knowledge of his goods that his valid trade-mark had come to describe their character, quality, and ingredients, to deprive him of the fruit of his labor just when it was most valuable to him.<sup>33</sup>

<sup>26</sup> 54 Fed. Rep. 175 (1893).

<sup>27</sup> 133 U. S. 308 (1889).

<sup>28</sup> 35 Fed. Rep. 150 (1888).

<sup>29</sup> 2 Am. Rep. 476 (1870).

<sup>30</sup> 43 Ch. Div. (Eng.) 604 (1890).

<sup>31</sup> 22 W. R. (Eng.) 53 (1873).

<sup>32</sup> 122 N. Y. 65 (1890).

<sup>33</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, p. 305, citing 25 Ohio L. J. 319 (1891); 32 Fed. Rep. 94 (1887); 45 Am. Rep. 169 (1883); 16 Pat. Off. Gaz. 679 (1891).



## DOCTRINE OF TRADE-MARK PROTECTION

7. The object or purpose of the law in protecting trade-marks as property is twofold: (1) To secure to him who has been instrumental in bringing into the market a superior article of merchandise, the fruit of his industry and skill; (2) to protect the community from imposition, and furnish some guarantee that an article, purchased as the manufacture of one who has appropriated to his own use a certain name, symbol, or device as a trade-mark, is genuine. Consequently, the violation of property in trade-marks works a twofold injury: (1) The appropriator suffers, in failing to receive that remuneration for his labors to which he is justly entitled; and (2) the public suffers in being deceived and induced to purchase articles manufactured by one man, under the belief that they are the production of another.<sup>34</sup>

Since the office of a trade-mark is to designate the true origin or ownership of the article to which it is affixed, or in other words, to give notice who was the producer, unless it give such notice, he who first adopted it cannot be injured by any appropriation or imitation of it by others, nor can the public be deceived.<sup>35</sup> It results that, where the validity of a trade-mark and the right to secure protection in its exclusive use is questioned, the primary inquiries are: Is the trade-mark of such a nature as to fulfil the purpose of its office? Is it distinctive in its original signification, pointing to the origin of the article, or has it become such by association? An affirmative answer to these questions will secure protection from the court, provided the mark can be upheld as the exclusive property of one without interfering with the property rights of others.

A trade-mark has been likened to a man's business autograph. Just as one places his signature to commercial paper, making it an assurance to others that he executed it, so his selection and adoption of a trade-mark is indicative of the excellent reputation of the manufacture upon which

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<sup>34</sup> 35 Conn. 402 (1868).

<sup>35</sup> 13 Wall. (U. S.) 311-328 (1872).

he places his symbol or device as a trade-mark. This is the declared theory on which the right to a trade-mark is properly based. Having acquired a reputation for excellence in the manufacture or preparation of an article, which reputation is the source of profit to him, he is entitled to protection, the same as he is in the advantages of the good-will of his established business. So that the purchasing public may know the origin of such articles when offered for sale, and that they are his manufacture or preparation, he may adopt and place on them, as the index of their origin, some device or symbol not used by others upon similar articles.<sup>36</sup>

Although a particular device or symbol that merely denotes the quality, character, material, or grade of an article will not secure registration as a trade-mark, it must not be overlooked. It is claimed, "that a trade-mark is indirectly the guaranty of the quality of an article to which it is attached, as well as of its origin and ownership, for, in all cases, the trade-mark in indicating the origin by necessary implication represents the quality of the article which is the true source of its reputation in the market. There is no abstract right in a trade-mark. It is property only when appropriated and used to indicate the origin and ownership of an article or goods, and its real value consists in the confidence and patronage of the public, secured through its instrumentality in acquainting them with the origin and ownership of an article which thus gains reputation for its superior qualities."<sup>37</sup>

Title to a trade-mark is acquired by legal adoption and use. In the United States, the consensus of the cases is that as soon as the mark is applied it becomes the property of him who first formally makes the application. In England, the decided cases seem to indicate that there must be something more than mere adoption and application of a trade-mark to create an exclusive right at common law.<sup>38</sup> Legal adoption means the selection and appropriation of some device or symbol that is legally capable of exclusive

<sup>36</sup> 40 Minn. 243 (1889).

<sup>38</sup> Browne Trade-Marks, Sec. 52.

<sup>37</sup> 81 Ky. 73 (1883).

appropriation, one which has not been previously used by others for the same class of merchandise or business, and which has been applied to goods and a use in trade in such manner as to show an intention to adopt it as a trade-mark for a specific article. Therefore, it seems that the more logical and useful rule as to the acquisition of title is the one suggested by an authority, "that the instant a vendor adopts a valid trade-mark to indicate his goods, and applies it to his goods with his name and address, and sells his goods in the open market in the regular course of trade, his title becomes complete and established."<sup>39</sup>

### REGISTRATION

8. *In the United States.*—Trade-marks are protected by registration in the United States patent office. The acts of congress of 1876 and 1881 constitute what is known as the national trade-mark law. The commissioner of patents is empowered by the latter act to "decide the presumptive lawfulness of claim to the alleged trade-mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of the courts of equity in the United States in analogous cases."<sup>40</sup> An appeal from the decision of the commissioner of patents lies to the circuit court of appeals of the District of Columbia, and from that court to the supreme court of the United States, as in copyright cases.

Registration of trade-marks is limited by statute to the owners of trade-marks used in commerce with foreign nations or with the Indian tribes, "provided such owners shall be domiciled in the United States, or located in any foreign country or tribes, which, by treaty, convention, or law, affords similar privileges to citizens of the United States."<sup>41</sup> The provision that trade-marks to secure registration must be such as have been "used in commerce with foreign

<sup>39</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 26, pp. 346-349.

<sup>40</sup> U. S. R. S., Sec. 4, 949.

<sup>41</sup> U. S. R. S., Secs. 4,937-4,947.

nations or Indian tribes" is complied with by sending a few samples of the goods, with the trade-mark affixed, to a merchant or dealer in Canada or Mexico. The trade-mark must have been adopted and used before application for registration is made, and herein, it differs from the application for a patent, which cannot be successfully made for an article that has been in public use, or described in a publication, for more than two years prior to the application.

To secure registration, a full compliance with the statutory requirements is necessary. These requirements are the filing of and causing to be recorded in the patent office a statement specifying the name, domicil, location, and citizenship of the party applying, the class of merchandise, and the particular description of goods comprised in such class to which the particular trade-mark has been appropriated, a description of the trade-mark itself, with *facsimiles* thereof, and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used. Those statements comprise the application, which, in order to create any right in the party filing it, must be accompanied by a written declaration verified by the person, or by a member of the firm, or by an officer of the corporation applying, to the effect that such party has at the time a right to the use of the trade-mark sought to be registered, and that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that such trade-mark is used in commerce with foreign nations or Indian tribes, as above indicated; and that the description and *facsimiles* presented for registry truly represent the trade-mark sought to be registered. The application must be accompanied by the government fee.<sup>42</sup>

On the receipt of the application it is noted and recorded, and, if it appear that the alleged trade-mark has been lawfully used as such by the applicant in foreign commerce or

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<sup>42</sup> Act Mar. 3, 1881, Secs. 1, 2.

commerce with Indian tribes, or is within the provision of a treaty, convention, or declaration with a foreign power, that it is not merely the name of the applicant, nor identical with a registered or known trade-mark owned by another and appropriate to the same class of merchandise, nor in near resemblance thereto, the trade-mark will be registered, and a certificate of registry issued in the name of the United States of America under the seal of the department of the interior and signed by the commissioner of patents, a record of which is kept in books for that purpose. The certificate remains in force for thirty years from its date, except in cases where the trade-mark is claimed for and applied to articles not manufactured in the United States, and in which it receives protection under the laws of a foreign country for a shorter period, in which case it shall cease to have force in the United States by virtue of the statute at the time that such trade-mark ceases to be exclusive property elsewhere. At any time during six months prior to the expiration of the term of thirty years, such registration may be renewed on the same terms and for a like period.<sup>43</sup>

**9. In Great Britain.**—A trade-mark in Great Britain may be a name printed or otherwise delineated in some particular or distinctive manner, or signature, or a device, mark, brand, heading, label, ticket, or fancy word or words not in common use; and there may be added to any one or more of these particulars any letters, words, or figures, or combination of letters, words, or figures, or any of them. Registration is compulsory, at least in the sense that the owner cannot prevent infringement or sue for damages for infringement unless he have registered, though it appears that this disability exists only in the case of a mark capable of being registered under the statute that requires it. Registry of trade-marks in Great Britain was first established in 1875 by the Trade-Marks Registration Act. In 1883, this act was repealed by the Patents, Designs, and Trade-Marks Act, in which the principal provisions of

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<sup>43</sup> Act Mar. 3, 1881, Secs. 3-5.



the act of 1875 were incorporated, and by which applications for registration are required to be addressed to the comptroller of patents. Should he refuse to register there is an appeal to the board of trade. If there be opposition, the matter goes to the high court of justice. Registration continues good for fourteen years.<sup>44</sup> The act describes the manner of registration. It is required that there shall be kept at the patent office a book called register of trade-marks, wherein shall be entered the names and addresses of proprietors of registered trade-marks, ratification of assignments and of transmissions of trade-marks, and such other matters as may be from time to time prescribed.

The application must be made in the form prescribed, and must be left at, or sent by post to, the patent office, directed, as before stated, to the comptroller of patents. It must be accompanied by the prescribed number of representations of the trade-mark, and must state the particular goods or classes of goods in connection with which the applicant desires the trade-mark to be registered. A person, claiming to be the proprietor of several trade-marks which resemble each other materially, yet differ in respect of the statement of the goods for which they are respectively used, or statements of numbers, price, quality, or names of places, may have such trade-marks registered as a series in one registration. Such a series is assignable and transmissible only as a whole, but for all other purposes each of the trade-marks composing a series shall be deemed and treated as registered separately. A trade-mark may be registered in any color, and such registration confers on the registered owner the exclusive right to use the same in that or any other color.

The act further provides that every application for registration shall be advertised by the comptroller, as soon as may be after its receipt, and that any person may, within two months after the first advertisement, give notice in duplicate of opposition, the copy of which notice must be sent to

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<sup>44</sup> *Encyc. Brit.*

the applicant, who, within two months after its receipt, or such further time as the comptroller may allow, may send to the comptroller a counter statement in duplicate of the grounds on which he relies for his application. If he do not, he will be deemed to have abandoned his application; but if he send such counter statement, it becomes the comptroller's **duty** to furnish a copy thereof to the person who gave notice of opposition, and to require him to give security in such manner and to such amount as the comptroller may require for such costs as may be awarded in respect of such opposition. Default in giving such security within fourteen days after requirement is equivalent to a withdrawal of opposition; but if security be given, notice thereof is sent to the applicant and the case is deemed to stand for the determination of the court. Where each of several persons claims to be registered as proprietor of the same trade-mark, the comptroller may refuse to register any of them until their rights have been determined according to law, and the comptroller may himself submit their rights to the court, or require the claimants to do so. Except where the court has decided that two or more persons are entitled to be registered as proprietors of the same trade-mark, the comptroller shall not register, in respect of the same goods or description of goods, a trade-mark identical with one already on the register, with regard to such goods or description of goods; nor shall he register, with regard to the same goods or description of goods, a trade-mark so nearly resembling a trade-mark already on the register with regard to such goods or description of goods, as to be calculated to deceive. And it is not lawful to register, as part of or in combination with a trade-mark, any words, the exclusive use of which would, by reason of their being calculated to deceive or otherwise, be deemed disentitled to protection in a court of justice.

The act declares that registration shall be deemed equivalent to public use of the trade-mark; also, that the registration of a person as proprietor of a trade-mark shall be *prima facie* evidence of his right to the exclusive use of the

trade-mark; that after the expiration of five years from the date of registration, the fact of registration shall be conclusive evidence of his right to the exclusive use of the trade-mark. Provision is made for the renewal of a trade-mark after the expiration of the first period or term of fourteen years. To this end the registered proprietor is notified at least two months before the expiration of the first period that his trade-mark will be removed from the register unless the prescribed fee for a continuance of the registry is paid. At the expiration of one month from the date of the first notice, if the prescribed fee be not paid, the comptroller is required to send a second notice to the same effect as the first. If the fee be not paid before the expiration of fourteen years, the comptroller may, after three months from the expiration of such fourteen years, remove the trade-mark from the register, and so on from time to time at the expiration of every fourteen years. The matter of restoring a trade-mark once removed from the register is placed within the discretion of the comptroller, and he may restore it, if he be satisfied, that it is just to do so.

The general provisions of the law of Great Britain provide for the action of the comptroller in matters pertaining to registration. For instance, when discretionary power is given to that official, he cannot exercise it adversely to the applicant without giving the applicant an opportunity of being heard, if the latter ask for a hearing within the prescribed time. And the meaning of certain terms is explained in these general provisions: "Person" includes body politic; "the court" means high court of justice, subject to the provisions for Scotland, Ireland, and the Isle of Man; "comptroller" means the comptroller-general of patents, designs and trade-marks.

**10. In Canada.**—It is required by the trade-mark law of Canada that a register shall be kept in the office of the minister of agriculture in which book any proprietor of a trade-mark may have the same registered by complying with provisions of the act. The minister may from time to time

make rules and adopt forms, which are subject to the approval of the governor in council, and he may provide himself with a seal with which to seal trade-marks and copies. He may object to registering any trade-mark in the following cases: (1) If he be not satisfied that the applicant is undoubtedly entitled to the exclusive use of such trade-mark; if the trade-mark proposed for registration be identical with or resemble a trade-mark already registered; (2) if it appear to be calculated to deceive or mislead the public; (3) if it contain any immorality or scandalous figure; (4) if it do not contain the essentials necessary to constitute a trade-mark, properly speaking. The minister of agriculture may, if he think fit, refer the matter to the exchequer court of Canada, which has jurisdiction to hear and determine the matter, and to make an order determining whether and subject to what conditions, if any, registration is to be permitted; and that court may, on information of the attorney-general, or at the suit of any person aggrieved by an omission, without sufficient cause, to make entry in the register of trade-marks, or by an entry made therein without sufficient cause, make such order making, expunging, or varying the entry as the court thinks fit, or the court may refuse the application, and, in either case, may make such order with respect to the costs of proceedings as it thinks fit.

Included in proper subjects for trade-marks are all marks, names, brands, labels, packages, or other business devices, which may be adopted for use by any person in his trade, business, occupation, or calling, for the purpose of distinguishing any manufacture, product, or article by him manufactured, produced, compounded, packed, or offered for sale, no matter how affixed, whether to the article itself or to its case or other receptacle. Timber or lumber, on which labor has been expended by any person in his trade, business, occupation, or calling, shall be deemed a manufacture, product, or article.

A trade-mark may be *general* or *specific*, the latter being intended for merchandise of a particular description. A general mark endures without limitation; a specific mark

endures for twenty-five years, and is renewable for similar periods. The applicant must state whether his mark is general or specific. The mode of presenting a subject for registration as a trade-mark is by forwarding to the minister of agriculture a drawing and description of the trade-mark in duplicate, with a declaration of novelty, that is, that the same is not in use to his knowledge by any person other than himself, at the time of his adoption thereof, and the fee. On registration one of the copies of the drawing and description, signed by the minister or his deputy, duly sealed and certified, is returned to the applicant. If the application be refused, the fee less five dollars will be returned. The certificate is made *prima facie* evidence in all courts in Canada of the facts therein alleged.

**11. In Other Countries.**—Trade-mark laws providing for the exclusive use of articles as trade-marks are in force in nearly all countries. Though differing in some of their principal provisions, those laws all seek to grant similar rights in respect to marks adopted for business purposes, as are provided by the laws of the United States, Great Britain, and Canada. It will suffice to mention the provisions of the laws of France and Germany, with mere references to the laws of other countries.

In France, the mark of manufacture and commerce is optional. Decrees rendered in the form of regulations of public administration can, except in certain cases, declare marks to be obligatory for the products that they specify. Included in marks of manufacture and commerce are names under a distinctive form, denominations, emblems, imprints, stamps, stamped tickets, vignettes, reliefs, letters, ciphers, envelopes, and all other signs serving to distinguish the products of a manufacturer and the objects of commerce. No one can claim the exclusive property of a mark who has not deposited the same with a clerk of the tribunal of commerce of his domicil, three *facsimiles* of said mark, and a stereotype plate of said mark. In case of the deposit of several marks belonging to the same person, a single



application only is required; but there should be deposited with every trade-mark three *facsimiles*, or as many stereotypes as there are different variations of the mark. One of the copies deposited shall be retained by the depositor, with the signature of the clerk attached, and bearing the indication of the day and the hour of deposit. The dimensions of the stereotype must not exceed twelve centimeters each way. The stereotypes will be returned to the depositor on the official publication of the mark. The deposit has effect for fifteen years, and the property of the mark may always be protected for a new term of fifteen years by means of a new deposit.

Foreigners who possess establishments of manufacture and commerce in France enjoy for the products of their establishments the benefit of the French law of June 3, 1857 (with its modifications by the president of the French republic in May 3, 1890), upon fulfilling the formalities as prescribed. Foreigners and French citizens, whose establishments are situated outside of France, may equally enjoy the benefit of the law for the products of their establishments, if in the countries where they are situated diplomatic conventions have established reciprocity of French marks. In such case the deposit of the foreign marks shall be with the clerk of the tribunal of commerce of the department of the Seine.

**12.** In Germany, by the Merchandise Mark Law of 1894, any person who desires to employ in his business a merchandise mark to distinguish his merchandise from that of others may declare it for registry in the roll of marks (*zeichen rolle*) which is kept in the patent office. The declaration, which is required to be made in writing to the patent office, must be accompanied by a statement of the enterprise for which the mark is to be employed and a specification of the merchandise for which it is intended, as well as a distinct representation of the mark and a description thereof. In the roll of marks is written the date of the declaration; the facts required to accompany the declaration; the name and domicile of the proprietor of the mark and of his proxy, if any; also,

any changes in the person, the name of the domicil of the proprietor of the mark and his proxy, the date of the renewal of the declaration; and the date of cancelation of the mark, if canceled, which may be done at any time on demand of the owner. Every registry and cancelation is officially published. Notifications concerning registry, assignment, or cancelation of marks are given by registered letter.

The general provisions of the German law provide for refusal of merchandise marks which consist exclusively of letters and numerals, or of words containing indications of the mode, time, or place of production, or of quality, destination, price, quantity, or weight of the merchandise, as well as those which contain the arms of German or foreign states, or those of a locality, parish, or union of towns situated in the country, and those which contain scandalous representations, or indications evidently at variance with the facts and liable to cause deception. Canceled marks cannot be registered anew in favor of another than the last proprietor for merchandise identical or analogous with that for which they were registered, until after two years from the date of cancelation. If the patent office shall regard any declared mark to be in conflict with one previously declared for similar merchandise, it shall advise the owner of the earlier mark; and, if within one month he shall make no opposition to the registry of the new declared mark, it may be registered; otherwise, the office shall determine whether there be an actual conflict. By other general provisions are regulated various matters in connection with registry and cancelation, including the necessary rules for the execution of the law respecting the registry of trade-marks.

#### INTERNATIONAL REGISTRATION

**13.** Among the other countries, not hereinbefore mentioned, which have laws providing for securing the exclusive use of trade-marks are Austria, Belgium, Brazil, Denmark, Japan, Italy, Norway, Roumania, Russia, Sweden, Switzerland, and Turkey. Between some of these countries, and between other countries, as well as between the United

States and some of the countries foreign thereto, treaties have been made by which the citizens and subjects of each of the contracting parties enjoy in the territories of the other, the same protection as native citizens or subjects in regard to patents, trade-marks, and designs, upon fulfilment of the formalities prescribed by law. Among these treaties are those between France and Roumania, and Germany and Roumania, in 1895, and those between the United States and Japan, in 1894 and 1897.

The convention and final protocol between the United States and other nations, concluded by the international union for the protection of industrial property, the purpose of which was to form a union of the governments assenting thereto, and to which the United States acceded March 27, 1887, was never heartily cooperated in by the United States, because, as explained by an authority, "our patent system was the stumbling block. It was found that it was imperiled by too much concession—the same difficulty which caused Great Britain to virtually withdraw. There was a general desire to disentangle trade-marks from the objects of the international union."<sup>45</sup> Subsequently, in 1891, an arrangement was made at a conference held in Madrid, which provided for international registration of trade-marks. The United States never became fully bound by the action of this union constituted by that arrangement, and, therefore, international registration does not apply to that nation.

14. The countries which originally agreed to the convention and protocol concluded in 1883 are Belgium, Brazil, Dominican Republic, Great Britain, France, Guatemala, Italy, Luxemburg, Mexico, Netherlands, Norway, Paraguay, Portugal, Roumania, Salvador, Servia, Spain, Sweden, Switzerland, Tunis, Uruguay, and the United States (though not cooperating). Nations which have not joined the union are Argentine, Austria, Chile, China, Germany, Greece, Denmark, Egypt, Japan, Peru, Russia, and Turkey. In the articles of the convention relating to trade-marks, it is provided that

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<sup>45</sup> Browne Trade-Marks, Pref. to Supp. to 2d Ed., p. iv.

"the subjects or citizens of each of the contracting states shall enjoy, in all the other states of the union, so far as concerns patents for inventions, *trade or commercial marks*, and the commercial name, the advantages that the respective laws thereof at present accord, or shall afterwards accord to subjects or citizens. In consequence they shall have the same protection as these latter, and the same legal recourse against all infringements of their rights, under reserve of complying with the formalities and conditions imposed upon subjects or citizens by the domestic legislation of each state." It is further provided that "the commercial name shall be protected in all the countries of the union without obligation of deposit, whether it forms part or not of a trade or commercial mark."

The sixth article, paragraph one, declares that "every trade or commercial mark regularly deposited in the country of origin shall be admitted to deposit and so protected in all the other countries of the union," which, as declared in the final protocol, "is to be understood in the sense that no trade or commercial mark shall be excluded from protection in one of the states of the union, by the mere fact that it may not satisfy, in respect to the signs composing it, the conditions of the laws, of this state, provided that it does satisfy, in this regard, the laws of the country of origin, and that it has been in this latter country duly deposited. Saving this exception which concerns only the form of the mark, and under reservations of the provisions of the other articles of the convention, the domestic legislation of each of the states shall receive its due application. In order to avoid all misrepresentation, it is understood that the use of public armorial bearings and decorations may be considered contrary to public order in the sense of the final paragraph of article six," which paragraph is to the effect that the deposit may be refused if the object for which it is asked be considered contrary to morals and to public order.

So far as the United States is concerned in the provisions of the convention and final protocol of the international union, it is judicially declared in an early case that "a treaty

is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial; but it is carried into execution by the sovereign power of the respective parties to the instrument. . . . When the terms of the stipulation import a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, not to the judicial, department; and the legislature must execute the contract before it can become a rule for the court.”<sup>46</sup> So that when, in 1889, the attorney-general of the United States was called on to decide as to the effect of senatorial confirmation—the president of the United States having in 1887 proclaimed adherence to the convention and protocol of 1883—he based his opinion on the opinion just quoted, stating in effect that the treaty is a reciprocal one. “Every party covenants to grant to the subjects and citizens of the other parties certain special rights, in consideration of the like special rights to its subjects and citizens. It is a contract operative in the future infraterritorially. It is, therefore, not self-executing, but requires legislation to render it effective for the modification of existing laws.”<sup>47</sup> Consequently, unless congress shall have legislated in the matter, the United States must resort to independent treaties, or conventions, in the matter of international registration.<sup>48</sup>

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## INFRINGEMENT

**15. General Principles.**—Where a trade-mark belonging to a person and used on certain articles of merchandise is used by another on articles of the same class, there is infringement of the former’s trade-mark, and he is entitled to relief through the medium of the proper court. The first appropriator of a name or device pointing to his ownership

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<sup>46</sup> 2 Pet. (U. S.) 314 (1829), by Marshall, C. J.

<sup>47</sup> Browne Trade-Marks, Pref. to Supp. to 2d Ed., p. v., citing *Opinions Atty.-Gen. U. S.*, 1889, p. 253.

<sup>48</sup> *Ibid.*, p. vi.



is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former.<sup>49</sup>

Imitating the marks used in connection with an article already on the market is regarded as attempting to pass off spurious goods on the public as the real article. In the United States, this is called *unfair competition*; in England, *passing off*; and in France, *concurrence deloyale*. The courts will always restrain unfair competition in trade. The ground upon which such relief is granted rests upon principle, either that the means used are dishonest, or that, by imitation of name or device, there is a tendency to create confusion in the trade, and enable the seller to pass off upon the unwary his goods as those of another, and thereby deceive the purchaser; or that, by false representation, it is intended to mislead the public, and to induce them to accept a spurious article in the place of one they have been accustomed to use.<sup>50</sup>

A distinction is made in the class of cases where there is unfair competition in trade and infringement of technical trade-marks, which consists principally in the proof required. The right of the owner of a technical trade-mark to relief rests not on the intention of the infringer, nor on his knowledge of the fact of infringement; intent will be presumed in such case. But where a label or style of package is imitated, creating unfair competition, an intent to deceive the public and to steal the market of the owner of the original article must be established by evidence of actual deception. Proof that the dealer offers the imitated article for sale as the genuine article, even though but a single sale is proved, is sufficient to sustain an injunction against a continuance of the wrong.<sup>51</sup>

Whether a trade-mark be infringed or not may be determined by the court by basing its conclusions on a comparison of the registered device with the alleged infringing one; the

<sup>49</sup> 13 Wall. (U. S.) 311 (1872).

<sup>51</sup> 90 N. Y. 457 (1882).

<sup>50</sup> 83 Fed. Rep. 33 (1897); 13 Ch. Div. (Eng.) 434 (1879); 138 N. Y. 244 (1893).

testimony of witnesses as to likeness is not necessary."<sup>52</sup> This suggests an inquiry into the extent of similarity between two trade-marks to justify a court in declaring one an infringement of the other. It may be stated as a rule that, if the resemblance be such as to deceive ordinary customers exercising ordinary care when purchasing, the trade-marks will be deemed to be substantially the same, but, in determining the resemblance, the device is not alone regarded; the article itself upon which the device is placed is also examined. Exact similarity is not required to constitute an infringement. There may be an infringement without it, if the similarity be sufficient to convey a false impression to the public mind, and, as before stated, it be of a character to mislead and deceive the ordinary purchaser exercising ordinary care and caution in such matters."<sup>53</sup>

**16. Infringement of Trade Names.**—Questions of infringement of trade names are decided upon the same principles of law as are applicable to trade-marks. As has been stated, the trade name of a firm, a corporate name, and the name of a publication are species of property of the same nature as trade-marks, and will be protected in like manner.

In the case of the name of a publication, it is held that there is neither honesty nor honorable competition in adopting for a similar purpose a name used by another, if it be employed in such a manner that the public may be imposed upon; and such a result must follow if the simulation be so successful that one article or creation is purchased or accepted for another. The courts hold to the view that, while one has no exclusive right to the name which he has adopted for his paper, the enforcement of the doctrine that trade-marks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive, by inducing or

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<sup>52</sup> 56 Fed. Rep. 830 (1893).

<sup>53</sup> 20 Fed. Rep. 883 (1884); 14 Wall. (U. S.) 511 (1871); 101 U. S. 64 (1879).

leading to the purchase of one thing for another.<sup>54</sup> As before stated, the name of a newspaper is a trade-mark.<sup>55</sup>

Generally, where a trade-mark consists of a name, anything will be held to be an infringement of it which has sufficiently the same appearance to cause one name to be mistaken for another, or which has the same sound when used to describe the article. The trade-mark name of an article is generally the essential feature of the mark by which the goods are known and designated, and an infringement will be held to exist where the name is employed by another, although the other indicia of package and labels may be different.<sup>56</sup>

The mere probabilities of deception justify the remedy by injunction.<sup>57</sup> If a trade-mark be simulated in such a way as probably to deceive customers, the piracy will be checked.<sup>58</sup> Thus, it is held that the trade-mark "Moxie" in the combination name "Moxie Nerve Food," is infringed by a similar use of the word "Noxie," the decision being based on the purpose of the use of the word "Noxie," which, it was assumed, was to deceive the public, because the imitation of the word "Moxie" on the labels, bottles, and wrappers of the complainant were imitated to such a degree to merit the granting of an injunction.<sup>59</sup> On the other hand, where the owners of the trade-mark "Weber, New York," sought to restrain certain persons from putting the name "Webster, New York" on their pianos, an injunction was refused because in the court's opinion the name "Webster" was not likely to deceive.<sup>60</sup>

#### PROCEDURE IN INFRINGEMENT

**17.** In the United States, prior to the enactment of the federal statutes now known as the national trade-mark law, there existed no satisfactory federal legislation in reference to trade-marks, and particularly of a criminal remedy for

<sup>54</sup> 2 Abb. Pr. N. S. (N. Y.) 459 (1867).

<sup>55</sup> 2 Brewst. (Pa.) 339 (1869).

<sup>56</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 26, p. 416.

<sup>57</sup> 4 McLean (U. S.) 516 (1849).

<sup>58</sup> 8 Am. Law Reg. N. S. 402 (1869).

<sup>59</sup> 33 Fed. Rep. 248 (1888).

<sup>60</sup> 13 N. Y. Supp. 338 (1891).

infringement of a trade-mark registered under federal statutes. Many of the states had adopted trade-mark laws differing so much in their provisions that it led to the passage of the federal statutes which now govern matters pertaining to trade-marks. Some of the state statutes provide registration and some do not; some provide for a criminal remedy; some do not.<sup>61</sup>

One of the federal statutes—the act of 1876—provided a criminal remedy for the infringement of trade-marks registered under federal legislation. Judicial interpretation of the statute of 1876 declared it inoperative and void on the ground that, with the previous statute of 1870, which had been declared unconstitutional and void, they formed practically one statute, and the penal statute of 1876 fell with the statute of 1870. Both enactments were declared unconstitutional and void, because their legislation was not limited to trade-marks used in commerce with foreign nations, or among the several states, or with Indian tribes.<sup>62</sup> Therefore, it seems that since the statute of 1881, under which trade-marks are at present regulated, failed to reenact the statute of 1876, which is declared inoperative, there really exists no operative federal statute that provides a criminal remedy for infringement, and the criminal remedies provided by state laws, where such exist, are the only ones in existence in the United States. It is seldom, however, that such a remedy is invoked in the United States, the remedy by injunction by courts of equity being the most usual recourse of all who are injured by infringement. But there is provided, by the statute of 1881, an action to recover damages for the wrongful use of any registered trade-mark.

In England, the Merchandise Marks Act, 1887, consolidated and amended the law of offenses relating to trade-marks and trade descriptions, repealing the act of 1862 and replacing it by fuller provisions. It is now an offense in England to forge a trade-mark, to falsely apply to goods any trade-marks, or any mark so nearly resembling a

<sup>61</sup> Am. & Eng. Encyc. Law (1st Ed.),  
Vol. 26, pp. 368-369.

<sup>62</sup> 40 Fed. Rep. 250 (1889); 100 U. S. 82  
(1879).

trade-mark as to deceive, to make a die, and the like, for the purpose of forging, or for being used for forging a trade-mark, to apply any false trade description to goods, to dispose of or have in possession any die, or the like, for the purpose of forging a trade-mark, or to cause any of the above-mentioned things to be done.”

**18. Jurisdiction of Equity Courts.**—The right of property in trade-marks was recognized in the common-law courts at an early date, but a long period elapsed before such right was protected by injunction in a court of equity. For nearly half a century, however, the jurisdiction of equity courts in such cases has become thoroughly established, and is frequently exercised, both in the United States and England.”

In the United States, the legislative authority enacted the trade-mark law of 1881, which, as to remedies, provided: “That registration of a trade-mark shall be *prima facie* evidence of ownership. Any person who shall reproduce, counterfeit, copy, or colorably imitate any trade-mark registered under this act, and affix the same to merchandise of substantially the same descriptive properties as those described in the registration, shall be liable in an action on the case for damages for the wrongful use of said trade-mark at the suit of the owner thereof; and the party aggrieved shall also have his remedy according to the cause in equity to enjoin the wrongful use of such trade-mark used in foreign commerce or commerce with Indian tribes . . . and to recover compensation therefor in any court having jurisdiction over the person guilty of such wrongful act; and the courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy.”

The state courts also have jurisdiction to enjoin a party from infringing the trade-mark of a competitor. This was declared by the supreme court of Indiana, which, in referring

<sup>63</sup> Encyc. Brit.

<sup>65</sup> 21 U. S. Stats. at L., p. 502, Sec. 7.

<sup>64</sup> Bisph. Eq. (4th Ed.), Sec. 556, citing 33 Conn. 157 (1865); 11 H. L. Cas. (Eng.) 523 (1865); 34 Beav. (Eng.) 157 (1865); 3 De G. F. & J. (Eng.) 217 (1861); 45 N. Y. 291 (1871); 21 Cal. 448 (1863).



to federal legislation previous to the national trade-mark law of 1881, declared that the act of congress, assuming to confer exclusive jurisdiction upon the federal courts in trade-mark cases, had been pronounced unconstitutional, by the cases cited therein. As to the federal decisions declaring the federal trade-mark statutes of 1870 and 1876 unconstitutional, the Indiana court said: "These decisions settle the question, and, beyond all doubt, settle it correctly, since congress has no more power to deprive the state courts of jurisdiction in trade-mark cases than it would have to deprive them of power to decide controversies concerning any other species of property. A trade-mark is not within the provisions of the federal constitution respecting copyrights and patents."<sup>66</sup>

**19. Parties to an Action.**—In an action at law or in equity, where the infringement of a trade-mark is in controversy, the plaintiff or complainant may be the owner of the trade-mark, or his assignee, if the latter take at the same time of the assignment to him the right to manufacture or sell the particular merchandise to which said mark has been attached; but there is no property in it as an abstract right.<sup>67</sup>

An alien who has sold his goods and used his trade-mark in the United States enjoys all the rights of a citizen, both as to common-law rights and under the statutes; but, by rule established by certain cases, a foreigner, who has never introduced his goods or conducted trade in the United States, nor used his trade-mark in connection therewith, no matter how extensive his trade-mark rights or the extent of his trade abroad, cannot be considered as having any common-law trade-mark rights in the United States, except so far as they are given him under Sec. 8 of the international convention, which provides that "the commercial name shall be protected in all the countries of the (international) union, without obligation of deposit, whether it forms part or not of a trade or commercial mark."<sup>68</sup>

<sup>66</sup> 118 Ind. 105 (1888), by Elliott, C. J., citing 100 U. S. 82 (1879); 39 Fed. Rep. 775 (1889); 40 Fed. Rep. 250 (1889).

<sup>67</sup> 2 Brewst. (Pa.) 321 (1869).

<sup>68</sup> Am. & Eng. Encyc. Law (1st Ed.). Vol. 26, p. 485, citing 15 Fed. Rep. 236 (1883); 52 Fed. Rep. 455 (1892).

In England, under the statutes to which reference has been made with respect to registration, and which make registration compulsory and necessary to support an action, except so far as a commercial name is concerned, an alien may maintain an action.<sup>69</sup> In most foreign countries, provisions have long existed for the registration of trade-marks; and they also form one of the classes of industrial property for the protection of which an international convention was formed in 1883.<sup>70</sup> The defendants in an action for infringement are, in general, any persons who violate the rights of another secured by the trade-mark laws. One who manufactures goods and puts the trade-mark of another upon them, though he does it innocently and conscientiously, becomes liable to the owner of the registered trade-mark.<sup>71</sup> The infringer must at least know that he has no right to the mark, and that knowledge will make him liable to account for the profits he has realized.<sup>72</sup>

**20. Evidence.**—As previously stated, in technical trade-mark cases, intent will be presumed. The injury to the owner need not be proved. The United States trade-mark law declares that registration shall be *prima facie* evidence of ownership; being *prima facie* evidence only, the fact of ownership may be disproved. If not disproved, the registration stands as uncontradicted proof of the ownership in the person in whose right and name it is registered. But, as stated before, there is no property in a trade-mark as an abstract title. It is assignable by the act of the owner or by operation of law to any one who at the same time takes the business, that is, the right to manufacture and sell the merchandise.<sup>73</sup> Where a trade-mark is a personal one, designating a particular person and his reputation and skill, it cannot be used by another, and, therefore, is not assignable. If such a trade-mark were to be used by others, it would be a fraud on the public.<sup>74</sup> Consequently, though the use of a trade-mark can generally be seen by the court at a glance,

<sup>69</sup> 28 L. J. Ch. (Eng.) 56 (1859).

<sup>70</sup> See *subtile* Copyright *supra*.

<sup>71</sup> 3 Myl. & C. (Eng.) 338 (1838).

<sup>72</sup> 10 L. T. N. S. (Eng.) 395 (1864).

<sup>73</sup> 2 Brewst. (Pa.) 321 (1869).

<sup>74</sup> 143 Mass. 592 (1887).

and if found on another's goods might be enjoined without further inquiry, courts will frequently require evidence to prove lawful ownership.

On the question of deception, although it may be presumed that the use of a registered trade-mark by an alleged infringer is calculated to deceive the mass of customers and thereby cause injury to the owner, the courts may, and often do, require proof either of actual deception of the rightful owner's customers, or the probability of deception.<sup>75</sup> It is, however, held that the mere probabilities of deception justify the remedy by injunction, and piracy will be checked if a trade-mark be simulated in such a way as probably to deceive customers.<sup>76</sup> As has been seen, whether a trade-mark be infringed or not may be determined by the court by basing its conclusions on a comparison of it with the alleged infringing one.<sup>77</sup> Intentional fraud is not necessary to entitle the plaintiff to protection; where the same mark or label is used which recommends the article to the public by the established reputation of another, who sells a similar article, and the spurious article cannot be distinguished from the general one, an injunction will be granted, although there was no intentional fraud.<sup>78</sup> These rulings and the unsatisfactory results of expert testimony, which are frequently offered and as often rejected, warrant the assertion, made by an authority, that "much the safer rule is to eliminate all question of the deception of the public and to rest entirely upon the ground of property."<sup>79</sup>

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<sup>75</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, p. 494.

<sup>76</sup> 4 McLean (U. S.) 516 (1849); 8 Am. Law Reg. N. S. 402 (1869).

<sup>77</sup> 56 Fed. Rep. 830 (1893).

<sup>78</sup> 4 McLean (U. S.) 516 (1849).

<sup>79</sup> Am. & Eng. Encyc. Law (1st Ed.) Vol. 26, p. 496.

# THE LAW OF INSURANCE

(PART 1)

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## INTRODUCTION

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### DEFINITION AND HISTORY

1. **Insurance** is a contract whereby, for an agreed premium, one party undertakes to compensate the other for loss on a specified subject by specified perils.<sup>1</sup> All that is requisite to constitute such a contract is the payment of consideration by the one, and the promise of the other to pay the amount of the insurance upon the happening of the contingency contemplated in the contract.<sup>2</sup> The *risk* or *peril* is the thing or event insured against; the *beneficiary* is the person named in the policy to whom the amount named therein is to be paid upon the happening; the *policy* is the written or printed form to which the contract has been reduced, and which evidences the agreement between the parties.

The contract of insurance had its origin in the necessities of commerce. It sprang from the law maritime, and derives all its material rules and incidents therefrom. It was unknown to the common law, whose remedies were so inadequate that disputes arising out of the contract were generally left to arbitration, until the year 1601 when an English statute, the preamble of which recognized the great benefit arising to commerce by the use of policies of insurance, was passed, creating a special court, or commission, to hear and determine insurance causes. The commission thus created was to be directed to the judge of the admiralty for

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<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> 105 Mass. 149 (1870).

*For notice of copyright, see page immediately following the title page*

the time being, the recorder of London, two doctors of the civil law, two common lawyers, and eight grave and discreet merchants. But it was not until the common law, under the influence of Lord Mansfield and other enlightened judges, imported into itself the various provisions of the law maritime relating to insurance that the courts of Westminster Hall began to furnish satisfactory relief to suitors; but even then the inadequacy of the law to settle complicated questions of average and contribution was manifest and notorious.

2. The first appearance of the contract of marine insurance in any code of laws was in the law maritime as promulgated by the various maritime states and cities of Europe. It undoubtedly grew out of the doctrine of contribution and general average, which is found in the maritime law of the ancient Rhodians. By this law, if either ship, freight, or cargo were sacrificed to save the others, all the persons indemnifying against loss had to contribute their proportionate share of loss. This division of loss naturally suggested a provisional division of risk (1) among those engaged in the same enterprise, and (2) among associations of ship owners and shipping merchants. Hence, it is found that the earliest form of an insurance contract was that of mutual insurance, which dates back to the 10th century, if not earlier, and in Italy and Portugal was made obligatory. The next step was that of insurance on premium. Capitalists familiar with the risks of navigation were found willing to guaranty against them for a small consideration or premium paid. This, the final form of contract, was in use as early as the beginning of the 14th century, and, according to tradition, was introduced into England in that century by the Lombard merchants who settled in London and brought with them the maritime usages of Venice and other Italian cities; but express regulations respecting the contract do not appear in any code or compilation of laws earlier than the commencement of the 15th century.<sup>3</sup>

The range of insurance has been gradually extended to

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<sup>3</sup> 11 Wall. (U. S.) 1 (1871).



indemnity against loss by fire, loss of life, injury to health, and the reparation for loss from other perils, such as the insolvency of debtors,<sup>4</sup> to contracts by benevolent and charitable associations by certificates in the nature of life insurance,<sup>5</sup> and even insurance against burglary.<sup>6</sup> In fact, insurance is applicable to every form of possible loss, and has been extended until it embraces almost every kind of risk, and has grown to such proportions that it enters into every department of business, and affects all classes of people and their property. It has, in consequence, everywhere become the subject of legislative regulation and control.<sup>7</sup> It is the purpose of this section to treat of the nature of the insurance contract, to explain the principles of law governing it, to apply those principles to the various kinds of insurance, especially the more common and usual forms, so far as they can be applied generally, and to point out special or particular legal rules that apply only to the various kinds, under special subtitles.

### NATURE OF THE CONTRACT

3. Insurance contracts are fundamentally for indemnity, and are liberally construed to that end by the courts.<sup>8</sup> Indemnity is the promise and undertaking of the contract, which can never be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage.<sup>9</sup> "Though based upon self-interest, yet it is the most enlightened and benevolent form which the projects of self-interest ever took. It is, in fact, in a limited sense and a practicable method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the overplus in favor of those who have less."<sup>10</sup>

<sup>4</sup> 95 Fed. Rep. 111 (1899).

<sup>5</sup> 59 N. J. Law 207 (1896).

<sup>6</sup> (1898) 2 Q. B. (Eng.) 136.

<sup>7</sup> 51 Ohio St. 163, 190 (1894).

<sup>8</sup> 10 Lea (Tenn.) 461 (1882).

<sup>9</sup> 3 Metc. (Mass.) 66 (1841).

<sup>10</sup> Preface to Dr. Morgan's Essay on Probabilities, and on Their Application to Life Contingencies and Insurance Offices, quoted in May Ins. (4th Ed.), Vol. 1, p. 4.

An insurance contract is governed by the same principles that govern other contracts.<sup>11</sup> It must be definite and certain, and such as to bind both parties—the one to insure, the other to pay the premium; and the parties also must have agreed upon all essential terms. If there be no meeting of minds, there is no liability for loss.<sup>12</sup> It is, however, a peculiar contract, distinguished by special characteristics, and requiring for its elucidation to be interpreted in the light of the circumstances in the midst of which it has grown up, and with a just appreciation of the purposes which it is designed to effect. It is moreover a conditional contract; for when no risk attaches no premium is to be paid, or, if paid, must in the absence of fraud be returned to the assured.<sup>13</sup> It is called by the French an *aleatory* contract—one in which the equivalent consists in the chances for gain or loss, to the respective parties, depending on an uncertain event, in contradistinction from a commutative contract, in which the thing given or done by one party is regarded as the exact equivalent of the money paid or act done by the other.<sup>14</sup> In other words, the contract involves risk or hazard; if no loss happen, the insurer is the gainer by the premium, but if loss happen he must make it good. It is, however, very different from a wager, as in a wager the risk of loss is created by the contract itself, while in insurance the risk exists independently of the contract, and the insurance merely shifts the liability from the one party to the other.<sup>15</sup>

4. It is claimed by some writers that insurance is a contract of indemnity only in respect of property insurances, such as marine and fire insurance, and not of life insurance. They have based their theories on good grounds, for the courts have in some cases so maintained; and we find such explanations of property insurance in the old books as this: "As to the essential part of this contract, it does not

<sup>11</sup> See *The Law of Contracts*.

<sup>12</sup> 40 W. Va. 508, 513 (1895).

<sup>13</sup> *May Ins.* (4th Ed.), Vol. 1, p. 7, citing 3 Burr. (Eng.) 1,237 (1761); 25 Hun (N. Y.) 583 (1881).

<sup>14</sup> *Ibid.*, p. 8, citing Code Civil 1,104.

<sup>15</sup> *Porter Ins.*, p. 7.

differ from a bond of indemnity.”<sup>16</sup> It has been considered proper to expatiate about the difference between marine and fire insurance and life insurance, as if the particular object of the former alone were to indemnify against a pecuniary loss, while life insurance is held to be a contract to pay a certain specific sum on the happening of a particular event,<sup>17</sup> without reference to any damage suffered by the insured in consequence. This distinction is declared by more modern authorities to be superficial, resting rather on the mode of applying the principles and of determining the amount of indemnity, than on any difference in the principles themselves.<sup>18</sup> Surely it will not be contended that accident insurance is not a contract of indemnity, for it is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition.<sup>19</sup> “The purpose in all cases is alike—indemnity for the loss of a valuable interest,” says an authority. “When it is said that fire, life, and other insurances are contracts of indemnity, it is simply intended that to support them the insured must have some interest in the thing insured. The amount of this interest, and the amount to be paid in case of loss, may be fixed by arbitrary agreement, even before the loss, according to the modern practice, if not strictly according to the ancient doctrine of insurance.”<sup>20</sup>

#### INSURABLE INTERESTS

5. It is a fixed rule of insurance law that the insured must have an interest of some kind in the subject-matter of the insurance, whether property or life.<sup>21</sup> The reasons given for the rule are: (1) That it is inexpedient that a contract so necessary for the protection of legitimate business should be prostituted to illegal uses as a mode of speculation; (2) that it is opposed to public policy, because

<sup>16</sup> Phill. Ins., p. 2.

<sup>17</sup> 24 N. J. Law 576 (1854); 16 Fed. Rep. 650 (1883).

<sup>18</sup> May Ins. (4th Ed.), Vol. 1, p. 10.

<sup>19</sup> 133 Ill. 556 (1890).

<sup>20</sup> May Ins. (4th Ed.), Vol. 1, p. 11.

<sup>21</sup> 23 Conn. 244 (1854).

demoralizing to the insured, that he should be permitted to enter into any contract under which he would have an interest in the destruction of the subject-matter rather than its preservation."<sup>22</sup>

**6. Life Insurance.**—Time was when the general doctrine prevailed, in life as well as in fire and marine insurance, that there must be an interest at the time of the loss as well as at the time the insurance was effected; that, in fact, the interest must continue to the time of death. This was the declaration of an oft-quoted English case, afterwards overruled as unsound law by another English case. A statute provides that "no insurance shall be made on the life or lives wherein the assured shall have no interest or by way of gaining or wagering," and "that in all cases wherein the assured hath interest in such life . . . no greater sum shall be recovered than the amount or value of such interest."<sup>23</sup> The court held that the word *hath* must be construed as necessarily referring to the time of effecting the insurance, and not the time of death.<sup>24</sup> Interpreting the English statute in accordance with the English decision, it is declared by the United States supreme court that the statute might almost be regarded as declaratory of the common law and as indicating the proper rule to be observed in the United States. The result is that any expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. A man has an insurable interest in his own life, in that of his wife, and the lives of his children; a woman, in the life of her husband; and a creditor, in the life of his debtor. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons may effect insurance on their joint lives for the benefit of the survivor or survivors. The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which

<sup>22</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, p. 846, citing 9 Ind. App. 131 (1893); 7 Am. Rep. 160 (1871).

<sup>23</sup> Stat. 14 Geo. III, c. 48.

<sup>24</sup> 15 C. B. (Eng.) 365 (1854); 108 Pa. 13 (1884); 9 East (Eng.) 72 (1807).

the insured has no interest.<sup>25</sup> To take the case out of the objection of being a wager policy, all that it is necessary to show is that the insured has some interest in the *cestui que vie*; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life will be impaired.<sup>26</sup> No principle of law is better settled than that a policy taken out by a person upon the life of another, in which he has no insurable interest, is illegal and void, as repugnant to public policy.<sup>27</sup>

The law as to persons having an insurable interest in life insurance is thus summarized: (1) Where the person insuring—the beneficiary—is the holder of an enforceable personal right against the person insured, such right existing at the time of taking out the insurance; (2) where the beneficiary is subject to a self-imposed liability in the discharge of which he has made expenditures for the benefit of the person insured, or has incurred an existing liability to third persons in respect to the person insured; (3) where the beneficiary occupies by reason of consanguinity, or in virtue of affection evidenced by numerous benefactions from the person insured, such a position that a presumption of prejudice to the party insuring will be implied from the death of the party insured.

**7. Property Insurance.**—The contract of fire insurance being one of indemnity, the insured must have such an interest in or relation to the insured property that he will sustain a loss from the peril insured against; otherwise, the policy would be a wager which the law condemns. The interest must exist when the policy is issued and at the time of the loss.<sup>28</sup> Thus, where one insures his buildings against fire and parts with his entire interest therein, the underwriter or insurer is not obligated to pay any one.<sup>29</sup> To constitute an insurable interest, a party should show either a legal or equitable title in the property insured;<sup>30</sup> but the extent of his interest may be no greater than a liability for

<sup>25</sup> 94 U. S. 457 (1877).

<sup>26</sup> 6 Gray (Mass.) 399 (1856).

<sup>27</sup> 76 Ala. 251 (1884).

<sup>28</sup> 71 Ill. 620 (1874); 75 Ind. 535 (1881).

<sup>29</sup> 132 N. Y. 135 (1892); 3 Metc. (Mass.) 66 (1841).

<sup>30</sup> 12 Iowa 291 (1861).



its care and preservation.<sup>31</sup> Where a will directs an executor to maintain a house for the use of a person during his life, the executor has an insurable interest in the house.<sup>32</sup> A sheriff, or marshal, who seizes goods under process of law and holds them pending controversy over the ownership, acquires a special property which gives him an insurable interest in the goods;<sup>33</sup> also, a receiver has an insurable interest in the property in his custody so far as by leave of court to enter into a contract of insurance;<sup>34</sup> likewise an agent, having his principal's property in his possession, and being responsible for it, may obtain insurance thereon in his own name, and in case of loss recover its full value, holding all beyond his own interest in trust for his principal.<sup>35</sup> A *cestui que trust* has such an interest in the trust property that he may insure it against loss in his own name.<sup>36</sup> A creditor who has a lien upon his debtor's property has an insurable interest therein.<sup>37</sup> As to judgment creditors, there is some conflict of authority. The federal and New York courts hold that such persons have an insurable interest;<sup>38</sup> but, in Pennsylvania, it is held that a judgment, being a general and not a specific lien, gives the creditor no insurable interest.<sup>39</sup> Besides the parties mentioned, those who have an insurable interest are innkeepers in the property of their guests in their custody; warehousemen and wharfingers, in the property in their custody; and all persons who come within the general rule, before stated, who have such an interest in, or relation to the property insured that loss will result to them if it be destroyed by fire. Even a judgment debtor, whose property has been seized on execution, has an insurable interest therein, although such property is in possession of the officers of the law. A consignee to whom goods are consigned for sale has an insurable interest in his expectant commissions and in the goods which are in transit,

<sup>31</sup> 45 N. J. Law 549 (1883); 27 N. Y. 163 (1863).

<sup>32</sup> 46 Barb. (N. Y.) 37 (1866).

<sup>33</sup> 26 N. Y. 117 (1862).

<sup>34</sup> 136 U. S. 287 (1890).

<sup>35</sup> 14 Wall. (U. S.) 504 (1872).

<sup>36</sup> 29 Cal. 19 (1865); 9 Allen (Mass.) 382 (1864).

<sup>37</sup> 103 U. S. 25 (1881).

<sup>38</sup> 15 Fed. Rep. 707 (1883); 62 N. Y. 47 (1875).

<sup>39</sup> 62 Pa. 340 (1869).

although he has made no advance thereon. Where he has made advances he secures an insurable interest for the amount advanced.<sup>40</sup>

8. In **marine insurance**, the general rule is that every person who is interested in a marine adventure has an insurable interest; more specifically, any person who stands in some relation, legal or equitable, to the adventure, by which he profits financially by the safe arrival of the property, or will sustain financial injury by its loss, damage, or detention, has an insurable interest.<sup>41</sup> An owner or part owner of insurable property has an insurable interest; also, one who has purchased and has secured title to the property, or is liable to pay for it whether it arrive or not, or has an election to accept it or reject it, or the property is appropriated to him. It is well settled that the owner of a ship may mortgage it to secure a debt, and still have an insurable interest. The mortgagee likewise has an insurable interest in the mortgaged vessel. If the latter insure the ship to the full amount of his debt and the ship be lost, the underwriters, if they pay the loss to the mortgagee, will be entitled to be substituted in favor of the mortgagee's claim against the mortgagor. Besides the persons specified, the list of those who have an insurable interest includes masters, seamen, charterers, consignees, agents, factors, and borrowers and lenders on bottomry and respondentia.

#### FORM OF CONTRACT

9. **Necessary Requisites.**—Contracts of insurance are, as a general rule, governed by the ordinary rules that govern all contracts. As to the matter of form, some peculiar features call for special mention. It is common for writers on the subject of insurance to say that a contract of insurance requires no formality—that it is usually lax and informal. While this statement is in the main true, and has the sanction of judicial observation, it is to be qualified to some extent.

<sup>40</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 13, p. 155, and the cases there cited.

<sup>41</sup> See *subtitle* Marine Insurance

Both in England and the United States, the courts have attested to the informality of insurance contracts, or the parts thereof as represented by what are known as insurance policies. In an English case, it is said that courts of law have always considered a policy of insurance as an absurd and incoherent instrument;<sup>42</sup> and, in the United States, it is declared that policies of insurance are generally the most informal instruments which are brought into courts of justice.<sup>43</sup> Yet, this exact informality—if the expression may be used—has by usage become somewhat of a real formality, both as to the preliminary agreement made between the parties and the policy. For it has come to be recognized, that “length of time and a multitude of judicial decisions, embracing almost every important word in the ancient, though inaccurate, form have at length so settled the force and meaning of its different parts, that any serious attempt to alter or reconstruct with reference to greater certainty or symmetry would doubtless lead to new doubts and new litigation and should be admitted only after the most careful consideration.”<sup>44</sup>

When it is said that no formality is essential to an insurance contract, either preliminarily or finally, it is not meant that the usual written contract made between insurer and insured is a matter of no moment; in fact, it is of the greatest importance. No one would sleep soundly and feel safely indemnified with a mere oral promise from an insurance company that, in case of fire, he would be compensated for the loss of his home and fireside. Yet, where there is no statute law to the contrary, a contract merely oral is sufficient to bind the parties.<sup>45</sup> Commercial usage, however, based on the imprudence of leaving the terms of a contract to the uncertainty of even the most active and retentive memory, and the force of established practice, from time immemorial, of executing important contracts in black and white, and, also, because the charters of insurance companies

<sup>42</sup> 4 T. R. (Eng.) 206 (1791), by Mr. Justice Buller.

<sup>43</sup> 5 Cranch (U. S.) 335 (1809).

<sup>44</sup> May Ins. (4th Ed.), Vol. 1, p. 45.

<sup>45</sup> 165 Mass. 565 (1896).

require policies to be in writing, has created formality as to insurance contracts so far, at least, as to require them to be in writing. But, there is no requirement that these contracts shall be under seal; though, even in the present time, both in England and the United States, incorporated underwriters issue policies under the corporate seals, as anciently required by the law.

**10. Policies.**—Contracts of insurance usually consist of two parts: (1) The preliminary agreement for a contract, a memorandum or arrangement between the insurer or agent specifying the terms or data upon which the contract proper is based, called by some writers the contract itself; and (2) the policy, the instrument whereby insurance is made, the printed form to which the contract has been reduced, and which evidences the agreement or contract between the parties, and which may be either a specialty or a simple contract.<sup>46</sup> Both of these parts are papers, partly written and partly printed, so common as not to require special description here; but the various kinds of policies call for particular explanation at this point.

Policies, as to property insurance, are of two kinds—open and valued. An *open policy* is one on which the value is not fixed, but is left to be determined in case of loss.<sup>47</sup> In the United States, an open policy sometimes means one in which the aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time; it may also mean one kept open for new subscriptions, or one on a cargo kept open for new subjects of insurance.<sup>48</sup> A *valued policy* is one on which the value is placed on the property insured and inserted in the policy in the nature of liquidated damages. In such a policy, the value of the subject-matter is expressly agreed upon.<sup>49</sup>

Other terms designating particular policies are: *Mixed policy*, one which is open as to certain property, and valued

<sup>46</sup> Joyce Ins., Sec. 145.

<sup>47</sup> Phill. Ins., Secs. 4-7; 101 N. Y. 458 (1886);  
2 Tex. Civ. App. Cas. (1893).

<sup>48</sup> Bouv. Law Dict., citing 12 La. Ann.  
259 (1857); 19 N. Y. 305 (1859); 6 Gray  
(Mass.) 214 (1856).

<sup>49</sup> 38 Ohio St. 128 (1882); 106 Pa. 20 (1884).

as to other property;<sup>50</sup> *blanket policy*, one which covers several distinct buildings or more than one kind of property, as both real or personal; *floating policy*, one which applies to goods of a class or kind, which, from its fluctuating, changing nature, differs as to specific articles, like stock in trade. Thus, a policy for a long period, upon goods in a retail shop, applies to goods successively in the shop from time to time.<sup>51</sup> Whenever the term *wager policy* is used, it denotes one founded on an ideal risk, a pretended insurance on something in which the insured has no interest, and who can, therefore, sustain no loss in case of the destruction or injury of the property.<sup>52</sup> Such a policy, being strongly reprobated by the courts, does not enter into our treatment of policies as belonging to any classification, but merely as an aid to the reader and student in specifying its nature.

Life-insurance policies, or contracts of insurance in respect of life, are specifically *interest* and *valued* policies, which terms are applied, not by way of classification, but to designate their character. An interest policy as opposed to a wager policy is one in which it appears by its terms that the beneficiary is interested in the person insured, or in other words, runs a risk; a valued policy is one in which the sum to be paid in case of loss is fixed by the terms of the contract.<sup>53</sup> There are, also, *paid-up* policies, in which all the annual premiums are paid, or considered to be paid, at one time, and *endowment* policies, which are based on a system of insurance that provides for the payment of the sum insured to the person whose life is insured.<sup>54</sup>

In the other classes of insurance, the general character of the contract, as explained, applies whether it be represented and signified by the policy alone or by a preliminary agreement, or application, and the policy. Where there are distinguishing features as to form, general nature, and scope, they are explained under the several subtitles.

<sup>50</sup> 2 Conn. 368 (1817).

<sup>51</sup> 17 N. Y. 424 (1858).

<sup>52</sup> Beach Ins., Sec. 484.

<sup>53</sup> 37 Wis. 593 (1875); 52 Mo. 213 (1873); May Ins. (4th Ed.), p. 56.

<sup>54</sup> And. Law Dict.; Bliss Life Ins. (2d Ed.), p. 6.



### PARTIES TO THE CONTRACT

11. All persons who are legally competent to contract generally are capable parties in contracts of insurance. They are respectively designated the *insurer* and the *insured*, the former being first considered, and the latter, under the titles of the various kinds of insurance. The **insurer**, otherwise the underwriter, is the person who agrees to make compensation to the other—the **insured**; the latter is the person whose life or property interest is covered by a policy of insurance.<sup>55</sup>

### INSURANCE COMPANIES

12. The business of underwriting insurance was formerly in the hands of private persons or common-law partnerships. At present it is almost exclusively carried on, in the United States, by incorporated companies, and, in some states, the business is confined to such companies by statutory enactment. Formerly, on the continent of Europe, private underwriting was extensively conducted; but there, as well as in England, the superior advantages of public companies are gradually leading to the abandonment of the ancient practice, and underwriting, particularly in mercantile insurance, is largely operated in by societies. Thus, in England, there is what is known as “Lloyd’s,” or Lloyd’s Associations, which are conducted by societies of capitalists, through which insurance is effected by each member writing his name to the policy, if he choose to take any portion of the risk that is offered, and against it the amount for which he elects to become liable in case of loss, with the date of his subscription.<sup>56</sup> The history, nature, and status of these associations will be hereinafter explained.<sup>57</sup>

The popular name for the incorporated institutions that have monopolized the business of underwriting, either by choice or through the effect of statutory enactment, is *insurance companies*. They are much like other private corporations in their incidents, but, in England and some of the

<sup>55</sup> Bouv. Law Dict.

<sup>56</sup> May Ins. (4th Ed.), Vol. 1, p. 57.

<sup>57</sup> See *subtitle* Lloyd’s Associations.

United States, certain conditions are imposed by legislation before they are permitted to organize and transact business, prominent among which are the requirements that they shall possess certain amounts of capital; that sums shall be paid in in cash or prescribed securities; that certain sums shall be deposited with the state as security; that they shall receive applications for insurance to a certain amount; that their several articles of incorporation shall be subscribed by members, recorded in the county in which the companies are located, and state the amounts of stock actually subscribed; and that public notice of their formation, names, and object shall be given.<sup>58</sup> Besides applying to incorporated companies, these prerequisites to the right to engage in the insurance business are enjoined, by statute in some states, on individuals, partnerships, and unincorporated companies.<sup>59</sup>

Insurance companies are commonly classified into stock and mutual companies. *Stock companies* comprise corporations, the organization and regulation of which are fully treated elsewhere in this Course.<sup>60</sup> The capital is contributed by stockholders who enjoy the profits of the business, the capital subscribed being liable for the contracts of the company. *Mutual companies* are those in which the members are the parties insured, who contribute premiums to a fund which is liable for indemnity to each member for loss, according to the terms of the contract. There is also a class of insurance companies, known as the mixed class, wherein the characteristics of both a stock and a mutual company are combined, their authority to do business on both the stock and mutual plans being granted by their charters or acts of incorporation. In the mixed class, certain members, who may or may not be insured, contribute a certain amount of the capital, for which they hold certificates of shares, and are entitled to interest on the same at a stipulated rate, or to an agreed share of the surplus receipts, after the payment of losses and expenses, to be estimated at certain periods.<sup>61</sup>

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<sup>58</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, pp. 879, 880, and cases there cited.

<sup>60</sup> See *The Law of Corporations*.

<sup>61</sup> Bouv. Law Dict.

<sup>59</sup> *Ibid.*, citing 23 Misc. (N. Y.) 574 (1898); 40 Am. St. Rep. 388 (1893).

Beneficial associations are sometimes held to be insurance companies within the meaning of the statute regulating such companies;<sup>62</sup> but, as stated in our treatment of beneficial associations, it is shown that the design is to afford protective relief, a philanthropic and benevolent and not a mere business enterprise, such as an insurance company which for a stipulated consideration or premium engages to make up any specific loss that its members may sustain.<sup>63</sup>

### MUTUAL INSURANCE

**13. Mutual insurance** is properly described as that form or system by which all the members reciprocally engage to insure each other, each person insured becoming a member of the company. The losses are paid out of a fund constituted by premiums paid by the members for indemnity against loss, or by assessments laid upon all the members, or by both premiums and assessments; that is, the members may contribute premiums in cash or in assessable notes, or part may be contributed in cash and part in notes.

It is claimed that the members of a mutual insurance company are both the insurers and the insured.<sup>64</sup> There is in this claim an apparent anomaly, where the two parties to a contract are in effect one and the same person. But it is the collective body of all the members—the company—that constitutes the insurer or one party to the contract, and each individual member stands in the relation of the insured—the other party to the contract. One may be a member of a corporation and contract with it, and not violate the principle that governs contracts generally—that in whatever different capacities a person may act, he never can contract with himself nor maintain an action against himself.<sup>65</sup>

Mutual insurance has been likened to partnership, because the insured becomes a member by virtue of the contract of insurance as represented by his policy of insurance; he is

<sup>62</sup> 46 Fed. Rep. 439 (1891).

<sup>63</sup> See *The Law of Beneficial Associations: Distinguished From Insurance Companies*.

<sup>64</sup> May Ins. (4th Ed.), Vol. 2, p. 1,281; Am. & Eng. Encyc. Law (2d Ed.), Vol. 21, p. 253.

<sup>65</sup> See *The Law of Contracts: Parties to Contracts*.

entitled to a share of the profits, and is liable to a share of the losses, measured by the amount of the premiums paid or agreed to be paid.<sup>66</sup> But, the fact that an insurance company is mutual does not create a partnership in the strict sense of the term;<sup>67</sup> for, it is held that a mutual company, being a body corporate, capable of contracting as such, the relation is between insurer and insured; the members are not partners between themselves. The contract is the contract of the corporation and whatever incidental advantages appertain to a member do not affect the contract in the policy.<sup>68</sup>

The true principle of mutual insurance is the payment by each of the insured of a certain sum of money toward a common fund, which fund is to be held for the protection of each person so contributing. A mutual company may insure for either note or cash; so may a stock company. The distinction between them rests on different principles. A stock policy rests solely on the credit of the capital stock of the company to one who may be an entire stranger to the corporation, who acquires no right of membership by reason of his policy, no right to participate in its profits, and who subjects himself to no liability by reason of its losses. In such case it can make no difference whether the premium be paid in cash or by note; that is a private matter between the insurer and the insured, which concerns no one but the parties to the contract. In a mutual company, the insured being a member, he is, as stated before, entitled to a share of the profits and responsible for the losses to the extent of his agreement. It is a statutory declaration, in some states, that all persons insuring with mutual companies "become members for and during the period they shall remain so insured and no longer, and shall pay such rates as shall be determined by the board of directors and be liable for all losses and expenses of said company to the amount of the premiums paid or agreed to be paid by the members respectively."<sup>69</sup>

<sup>66</sup> 86 Pa. 376 (1878).

<sup>67</sup> 37 N. J. Law 445 (1874).

<sup>68</sup> 50 N. Y. 610, 624 (1872).

<sup>69</sup> 86 Pa. 376 (1878), quoting Pa. Act of April 2, 1856, Sec. 11.

14. Like any other private corporation, the powers of an incorporated mutual insurance company are measured by its charter or the act of incorporation; if not incorporated, such a company is governed by the general law of partnership.<sup>70</sup> All the contracts of insurance of an incorporated mutual insurance company must conform to its charter or act of incorporation, which usually prescribes the mode in which premiums shall be paid. In case a method of paying premiums is not so prescribed, the company has of necessity implied power to fix the mode of premium; and it has also implied power to issue policies on the cash premium plan, express power to that effect not being essential, unless the company be expressly prohibited by its charter or law of incorporation from so doing.<sup>71</sup>

Assessments are made by the board of directors to pay losses and just claims. The authority to make them is vested in the directors by the charter, law of incorporation, or by-laws of the company, and the exercise of the power generally depends on the contingency or necessity of the case. It is, however, held to be the duty of a mutual insurance company to make assessments, whenever the necessity to pay losses and just claims exists.<sup>72</sup> But a company will not be permitted to raise funds by assessment to pay losses for which it is not liable, or to create a fund for an improper purpose.<sup>73</sup> An assessment should not be larger than necessary to meet existing claims and reasonable expense, and, if unreasonably excessive, it is void.<sup>74</sup> An assessment based upon the computation of losses from month to month has been held to be valid.<sup>75</sup> The manner of making assessments and of giving notice thereof is usually prescribed, either in the charter or by-laws. In the absence of any provision as to notice of assessment in the by-laws, the directors may give notice by publication as they may deem fit.<sup>76</sup>

In the case of the insolvency of a mutual insurance

<sup>70</sup> 72 Ga. 372 (1884).

<sup>71</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 21, pp. 257, 258, and the cases there cited.

<sup>72</sup> 50 Me. 301 (1862); 3 Gray (Mass.) 210 (1855).

<sup>73</sup> 1 Leg. Chron. (Pa.) 9 (1872).

<sup>74</sup> 7 Allen (Mass.) 235, 238 (1863).

<sup>75</sup> 1 Luz. Leg. Reg. (Pa.) 351 (1872).

<sup>76</sup> 31 N. Y. 304 (1865).



company and the appointment of a receiver, that official has the same power to make assessments as the directors had before insolvency, but he must act under the authority and sanction of the court and adhere strictly to the order of the court which appointed him. The principles of the law that govern private corporations, in case of the insolvency and dissolution, apply to insurance companies."<sup>77</sup>

### INSURANCE AGENTS

15. Under another title the principles of law that govern and regulate the rights, duties, and liabilities of agents are specially treated. In that section an agent is defined, in a general way, as "one who undertakes to transact the business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it."<sup>78</sup> It is further shown, under still another title, that "a corporation aggregate is so constituted that its transactions must be done by officers and agents; no act can be done except through the instrumentality and agency of others."<sup>79</sup> To these statements is added the declaration of an authority on insurance, that "all incorporated companies must necessarily act through agents, and their respective officers are specially appointed and clothed with powers, more or less specific, to facilitate the transaction of business. To these, in case of emergency, are added special or general agents, who at home and abroad exercise very extensive powers."<sup>80</sup>

An **insurance agent** is popularly known as one engaged in soliciting risks and effecting contracts of insurance. He may be such by appointment or by the recognition of his acts done as such;<sup>81</sup> he may be agent for either of the parties to the policy, or for distinct purposes for both.<sup>82</sup> There are various kinds of insurance agents, whose titles result from the character of their respective powers and duties. Thus, a

<sup>77</sup> See *The Law of Corporations: Receivers, Dissolution*.

<sup>78</sup> See *The Law of Agency: Definitions*.

<sup>79</sup> See *The Law of Corporations: Management, Officers and Agents*.

<sup>80</sup> *May Ins.* (4th Ed.), Vol. 1, p. 221.

<sup>81</sup> *Phill. Ins.*, Vol. 2, Sec. 1,848.

<sup>82</sup> 16 T. B. Monr. (Ky.) 252 (1855); 20 Barb. (N. Y.) 68 (1855); 59 Conn. 41 (1890).

*general agent* is one who represents the insurer in the conduct of the business generally in a particular place or territory; a *special agent* is one with delegated authority to do a single act connected with the employment in which he is engaged. There are, besides, *subagents*, *brokers*, and *soliciting agents*, and these may be all comprised in the one class, under the latter title, for any one who solicits insurance risks is a soliciting agent, no matter what other power or authority is delegated to him. However, subagents, properly speaking, are those to whom authority is delegated by a general agent to act within the scope of the latter's authority, the acts of the subagents, done in pursuance of such delegated authority, having the same effect as if done by the general agent himself. The term broker is usually applied to one who negotiates sales or contracts as an agent, or who makes sales and purchases for commission—a middleman.<sup>83</sup> As regarded in the light of the insurance business, an insurance broker is the agent of the insured and not the insurer. He acts as a middleman between the insured and the insurer, and solicits insurance from the public, under no employment from any special company, but having received an order places the insurance with the company selected by the insured, or, in the absence of any selection by the latter, then with a company of his own selection.<sup>84</sup> He owes no allegiance to any particular company, but is free to procure insurance for others in any company he may select, and to solicit and procure patronage for any insurance company or companies he may select.<sup>85</sup> However, both the insured and the insurer may, without relation to each other, place their business in the hands of a broker, with, it may be, conditioned terms, as with the right of inspection or approval.<sup>86</sup> An insurance broker has a lien on the policy in his possession procured for his principal, and on all the moneys received by him on such policy, for the payment of his commission, disbursements, advances, and services in and about the policy.<sup>87</sup>

<sup>83</sup> See *The Law of Agency: Brokers, Definition*.

<sup>84</sup> 125 N. Y. 63 (1890).

<sup>85</sup> 41 Ill. App. 512 (1891).

<sup>86</sup> 59 Ill. App. 608 (1894).

<sup>87</sup> Bouv. Law Dict.; 22 Me. 138 (1842).

16. Soliciting agents, as commonly known, are mere agents to solicit business and take applications for insurance and transmit them to the company for approval. One without any other authority cannot pass on risks and bind the company by a contract of insurance,<sup>88</sup> nor for the renewal of a policy,<sup>89</sup> nor, in fact, do anything that is not within the strict line of his authority as a mere agent to solicit business. It has often been declared that taking one's application for insurance, fixing the terms, and receiving the premium, are sufficient evidence of insurance; and so they are, when it thereby appears that the contract is complete, and nothing is wanting but the issuing of the policy. But, when it is plain that the application and payment of the premium amount only to a proposal for insurance, there is no completed contract which will be binding on the company.<sup>90</sup> It will be noted that the foregoing remarks refer to soliciting agents *per se*, and not to agents who, like general agents, are empowered by a delegation of authority to do all acts connected with the business of insurance, even to issuing policies. Many insurance agents combine with their entire delegated authority, besides the work of soliciting insurance, additional powers which go to make up authority of wide scope. Such persons are not usually designated soliciting agents, though acting as such in connection with other duties, but come under the more general title of general agent, and sometimes, general manager.

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#### POWERS AND LIABILITIES

17. The extent of the authority of agents is thus concisely stated by the supreme court of Massachusetts: "The authority of an agent must be determined by the nature of his business and the apparent scope of his employment therein. It cannot be narrowed by private or undisclosed instructions, unless there be something in the nature of the business or the circumstances of the case to indicate that the agent is acting under special instructions or limited powers. On the

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<sup>88</sup> 53 Ill. 516 (1870); 23 Pa. 72 (1854).

<sup>89</sup> 4 N. Y. App. Div. 516 (1896).

<sup>90</sup> 23 Pa. 75 (1854).

other hand, it does not follow, from the fact that a man is known to be an agent for another or for a corporation, that his principal is bound by all that he does. There are limitations which grow out of the very law of agency. In the first place, the act must appear to be an act of agency, that is, done in behalf of the principal. In the case of corporations created for a special purpose or engaged in a special business, the authority of the agent will be presumed to be limited by the nature of that purpose or business. So, too, the authority of every agent will be presumed to be limited by the apparent scope of the particular employment or branch of the general business of his principal in and for which he is engaged; and all who deal with him in that relation are affected by such apparent limit of employment and powers."<sup>91</sup> It would be difficult to add anything to the foregoing comprehensive view that will more clearly explain the character of the powers of insurance agents. It is, however, germane to refer to the treatment of authority of agents elsewhere in the Course, for additional light on a subject the solution of which is so closely connected with the law of agency."<sup>92</sup>

The questions which arise concerning the powers of insurance agents have been found more difficult of settlement than, not only those of the immediate officers of such companies, but also those of agents in other employments, and little more is attempted by text writers, in their elucidation of the subject, than a mere statement of the general principles of law that govern it. Thus, we find in a well-informed authority on life insurance, the statement that the "actual powers of such agents, both general and local, may be very different from their apparent powers, and it is therefore essential to remember that so long as the agent acts within the apparent scope of his authority, the company is bound by his acts, though they may be in excess of, or in violation of, his real powers—and such powers are *prima facie* coextensive with the business entrusted to his care, and

<sup>91</sup> 103 Mass. 92, 93 (1869), by Wells, J.

<sup>92</sup> See *The Law of Agency: Scope of Authority*.

will not be narrowed by limitations not communicated to those with whom he deals. Thus, if an agent is in fact authorized to make contract for insurance in a particular place, the company will be bound by his act in insuring elsewhere. So, if an agent habitually exceeds his actual powers, and the fact is known to the company, and they do not publicly disaffirm his acts, they will be bound by them, or rather he will be presumed to have had the powers he exercised. An agent is, moreover, conclusively presumed to have not only the usual and ordinary powers of an agent engaged in the business for which he is appointed, but all the powers necessary and convenient in the execution of his authority. Thus, an agent authorized to take applications, may as incidental thereto fill out the formal application and explain its terms, and the company will be bound by his acts while so doing. But an agent cannot bind the company by an unusual contract made in excess of his actual powers, and therefore an agreement to insert a clause, giving the insured the right after a time fixed to surrender the policy and receive back the money paid without interest was held void, though a part of the premium had been paid to the agent in cash, and a note given him for the remainder, which had been passed by the agent to a *bona-fide* holder, and paid by the assured."<sup>93</sup>

18. In the same view, other authorities, writing on insurance laws generally, have expressed the rules of law. "The authority of an agent," says one, "must be determined by the nature of his business, and is *prima facie* coextensive with its requirements. An agent authorized to issue policies binds the company by all waivers, representations, or other acts within the scope of his business, unless the insured has notice of a limitation of his powers. The question always is, not what power the agent did in fact possess, but what power the company held him out to the public as possessing. His power cannot be limited by special private instructions, unless the insured have notice, or there be something in the

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<sup>93</sup> Bliss Life Ins. (2d Ed.), pp. 460, 461.



nature of the business, or the circumstance of the case, to indicate that the agent is acting under special instructions. A provision in the policy that agents are only authorized to collect renewal premiums upon receipts furnished and signed by the president and secretary, is notice of such limitation of the agents' powers. So is a provision in the policy that they cannot waive any of its conditions. But a notice printed on the back of a policy, that payment to an agent will not be valid without the production of a receipt, is not. The agent's act must appear to be an act in furtherance of the business of his principal. If he is known to have charge of a special branch of his principal's business, his powers can only be exercised in the prosecution of that branch. An agent to make contracts has larger powers than an agent to receive applications to be forwarded to his principal. Stock companies have larger powers than mutual companies. So with their agents."<sup>94</sup>

The liability of an insurance agent begins with his service with the company and the performance of his duties. In this respect, as in others previously mentioned, the principles of the law of agency govern.<sup>95</sup> Our statements herein as to the particular employment of insurance agents are necessarily confined to such acts as pertain to the particular duties of this class of agents. Obligated to serve his principal—the company—in good faith and to the best of his ability, an insurance agent will render himself liable for all damages sustained by his principal, if he be careless or negligent or act in bad faith in his employment toward the company. Writing insurance contrary to instructions, neglect to cancel policies when ordered or requested to do so, neglect to forward the premium, and like acts will make the agent responsible to the company which is chargeable with such errors of commission or omission and liable therefor. Mistakes and omissions of the agent in preparing the description, and representations of the agent as to the

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<sup>94</sup> May Ins. (4th Ed.), Vol. 1, pp. 231-233.

<sup>95</sup> See *The Law of Agency: Duties and Rights of Agents, Brokers, Duties and Liabilities*.

sufficiency of the description or statements in the application are binding upon the company, and it may hold the agent accountable therefor.

**19.** An agent renders himself personally liable to third persons, such as applicants for insurance and persons who have actually become insured, by certain wrongful acts committed, or for the omission to perform certain acts which he is obligated to perform as agent. Thus, if he collect money as a premium for insurance, with the understanding that a policy is to be given therefor, and no policy be issued to the person, the agent is responsible for the amount paid; or if, by false representations, he induce any person to take out a policy and pay the premium thereon, he makes himself liable to an action for damages to the extent of the amount of the premium paid. So, a premium may be recovered from the agent who takes a premium for a policy issued after the company he represents has been denied authority to do business in a state by having its certificate revoked; and where an agent has received the premium for a policy, and before he has paid it over the company becomes insolvent, the party who paid the premium, having given notice that he claims the premium, and not relying on the worthless policy, may recover the money by a suit at law against the agent.<sup>96</sup> Any unauthorized act of an agent, by which a person is induced to enter into a contract of insurance, will give the party, if he suffer loss thereby, the right to an action against the agent; and, where such agent acts for his company *bona fide*, believing that he has authority to enter into a contract with another, he will nevertheless be personally responsible if he exceed his authority.<sup>97</sup>

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<sup>96</sup> 39 Hun (N. Y.) 238 (1886); 136 Mass. 229 (1884); 68 Mo. 122 (1878); 75 Ill. 492 (1874).

<sup>97</sup> 101 Pa. 311 (1882); Story Ag. 264.

# THE LAW OF INSURANCE

(PART 2)

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## LIFE INSURANCE

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### DEFINITION AND HISTORY

1. **Life insurance** is a contract by which the insurer, in consideration of a certain premium, either in a gross sum or periodical payments, undertakes to pay the person for whose benefit the insurance is made, a stipulated sum, or annuity equivalent, upon the death of the person whose life is insured, whenever this shall happen, if the insurance be for the whole life, or in case this shall happen within a certain period, if the insurance be for a limited time.<sup>1</sup> In the ordinary form it is a contract to pay a certain sum of money on the death of the insured. The form known as *endowment insurance* is a contract to pay a certain sum to the insured if he live a certain length of time, or, if he die before that time, to some other person indicated. In either of these forms the contract is, strictly speaking, an insurance on the life of the party.<sup>2</sup>

Life insurance was known in Europe in the 17th century. The first distinct reference is mentioned by Bliss, an authority on life insurance, as being taken from Hendrich's Assurance Magazine, which, in 1661, published translated passages on the subject from a French production formerly compiled for the benefit of the merchants trading in the city of Rouen. In 1681, life insurance on the lives of

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<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> 48 Minn. 110 (1892).

men, though allowed on the lives of redeemed captives, was forbidden in France by the ordinance of Louis XIV. The code of Napoleon omitted any reference to the subject, and most of the commentators seem to have been of the opinion that under the code life insurance was illegal. However, since 1820, life insurance has been permitted in France, though it is of slow development. In England, the first life insurance office was established in 1699, by the Mercers' Company, as a widow's fund, and in the following year there was established the Society of Assurance of Widows and Orphans, but the real introduction of life insurance in England seems to date from the establishment, in 1706, under a charter of Queen Anne, of the Amicable Society for a Perpetual Assurance Office. Life insurance was, however, also carried on in England to some extent by individual underwriters, in the same manner as marine insurance. In the United States, a Massachusetts case shows its existence as early as 1812, though its legality was questioned;<sup>3</sup> and it has only flourished and prospered into a business of importance in the United States within the last fifty years.

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### NATURE OF THE CONTRACT

**2. Requisites.**—The contract of insurance is an executory one, executed by the payment of the sum insured on a loss. Upon the part of the insured, the contract is executed by the payment of the annual premiums from year to year.<sup>4</sup> Besides parties capable of contracting, five ingredients are necessary: (1) The subject-matter; (2) the risk insured against; (3) the amount insured; (4) the duration of the risk; (5) the premium of insurance, or consideration. A contract deficient in any of these is incomplete.<sup>5</sup> There must be a subject-matter as a basis for the contract. This subject-matter is the life of a person. An insurance made when the subject-matter—the person—is dead is of no account, and recovery cannot be had.<sup>6</sup>

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<sup>3</sup> Bliss Life Ins. (2d Ed.), Secs. 1, 2.

<sup>4</sup> 27 Barb. (N. Y.) 354 (1858); 50 N. Y. 610 (1872).

<sup>5</sup> 4 Rob. (N. Y.) 151 (1866).

<sup>6</sup> 92 U. S. 377 (1875).

The premium or consideration in the legal sense of the word is the *quid pro quo*, that which the party to whom a promise is made does or agrees to do in exchange for the promise. The promise of the insurer is to pay a certain amount of money upon certain conditions. The consideration on the part of the insured is his payment of the whole premium at the inception of the contract, or his payment of part then, and his agreement to pay the rest at certain times while it continues in force.<sup>7</sup> The premium will be further treated more in detail.

**3. Parties.**—There must be competent parties to the contract. Any one *sui juris* can make a contract of life insurance. Married women as well as infants are competent to make contracts of insurance. A contract with and for the benefit of an infant, such as a contract for insurance, is not void, but only voidable, and that at the infant's election, since infancy gives a personal privilege of which no one but the infant can take advantage while he lives.<sup>8</sup> A contract for insurance of an infant's property against loss or damage by fire has been held not to be a contract for necessities for which the infant can be bound, and it appears the same ruling applies to insurance upon an infant's life.<sup>9</sup>

In life insurance, as in other insurance, the insurer is generally an incorporated company. Mutual benefit societies, or beneficial associations, the designs of which are philanthropic or benevolent and not merely for business, grant protective relief in case of sickness or death. The features that distinguish these associations from mutual life insurance companies have been explained.<sup>10</sup> So far as we are here concerned, by insurer in a life-insurance contract is meant a corporation engaged in the business of life insurance for profit.<sup>11</sup>

**4. Consummation of Agreement.**—Until the minds of the parties agree upon all points, the contract is not

<sup>7</sup> 120 U. S. 183 (1887).

<sup>8</sup> 53 Mich. 238 (1884).

<sup>9</sup> 32 N. H. 345 (1855).

<sup>11</sup> See subtitle Parties to the Contract *supra*.

<sup>10</sup> See *The Law of Beneficial Associations*: Distinguished from Insurance Companies.



complete. Where an application for insurance is presented to a company, stating what is wanted and the terms, and its officer or any agent having authority to issue a policy says one will be issued on that application, the minds of the parties have met in the execution of a contract, and a contract for insurance has been consummated.<sup>12</sup> The application for insurance is a mere proposal on the part of the applicant. When the answer signifies the acceptance of it to the proposer, and not before, the minds of the parties meet and the contract is made. If anything remain to be done to make a contract, if the agreement be not consummated, if all the terms have not been mutually agreed upon, no contract arises between the parties. Being a mere proposal to the company, the company can either accept the proposal, decline it altogether, or impose such conditions as to the making of the contract as it may choose. In many of the contracts prepared by insurance companies, the payment of the premium is the only condition imposed, after the application has been acted upon. In others, the delivery of the policy and the payment of the premium are the conditions upon which the company agrees that a contract shall arise. In some, the requirement that the policy shall be countersigned by the agent is necessary, and, in still others, it is requisite that between the acceptance of the application and the delivery of the policy nothing has intervened to increase the risk of the insurer. All of these conditions, whether wise or not, reasonable or unreasonable, are within the power of the insurer to impose. The insurer is not bound to accept the proposal made, and may impose such additional requirements to create the contract as it sees fit. The applicant is not bound to accept the contract variant from his application. Their failure to agree ends the negotiation. It is only when they agree that a contract arises; it is only when that agreement is reached that the mutual rights of the parties against each other arise. The proposal only becomes a binding contract when the party to whom it is made signifies his acceptance

<sup>12</sup> 164 Ill. 275 (1896).

of it to the proposer. The mere failure of an insurance company to respond to an application for insurance does not raise an inference that it has accepted and insured the risk. To bind the company there must be mutual acceptance. Silence operates as an assent and creates an estoppel only when it has the effect to mislead.<sup>13</sup>

5. It is not necessary to consummate a contract of insurance that the policy should be formally delivered.<sup>14</sup> Whether or not an insurance policy have been delivered after its issuance, so as to complete the contract and give it binding effect, does not depend upon its manual possession by the insured, but rather upon the intention of the parties as manifested by their acts and agreements.<sup>15</sup> Where there has been a contract of insurance entered into between a company and the insured, and nothing remains to be done to complete the contract, the mere fact that the policy has not been delivered does not affect the rights of the parties. The company is entitled to recover its premium and the insured is entitled to his policy.<sup>16</sup> As a general rule, whenever one parts with the custody and control of anything with the intention at the time that it shall pass into the possession of another, its delivery to such person has, in contemplation of law, become complete. The mere manual possession of the thing intended to be delivered is a matter of little consequence. Such possession may exist without any legal delivery, and it may not exist when a legal delivery has been effected. The controlling question then on this subject of delivery is, not who has the actual possession, but who has the right of possession. The possession of an agent is the possession of the applicant, where the policy has been delivered to the agent to give the applicant, and while in the hands of the agent the policy is simply held by him on deposit, or in trust for its real owner; this real owner has a right to demand possession of it.<sup>17</sup>

<sup>13</sup> 18 W. Va. 782 (1881); 10 Brad. (Ill.) 348 (1882); 17 N. Y. 421 (1858); 130 N. Y. 537 (1892).

<sup>14</sup> 26 Me. 18 (1846).

<sup>15</sup> 116 Ala. 659 (1897).

<sup>16</sup> 18 W. Va. 782 (1881).

<sup>17</sup> 104 Ga. 67 (1898).

**6. Law of Place.**—The general rule of law is that the law of the place where the contract is made, and not where the action is brought, is to govern in enforcing and expounding the contract, unless the parties have a view to its being executed elsewhere, in which case it is to be governed according to the law of the place where it is executed.<sup>18</sup> If a policy of insurance be prepaid in one country, and transmitted to the company's agent in another country with whom a person insures, the law of the country where the agent is governs the contract, it being in fact made there.<sup>19</sup>

#### POLICIES

**7. Definition and Kinds.**—A policy of insurance is a contract of insurance reduced to writing.<sup>20</sup> It is the final contract between the parties and supersedes all preliminary agreements. There are various kinds of insurance policies, but the kinds that apply to life insurance, as before stated, are interest and valued policies, the character of which, and the reasons for their being so designated, being fully explained elsewhere in this title, where, also, *paid-up* policies and *endowment* policies are defined.<sup>21</sup> Unless otherwise expressed, all policies import that the insured is interested in the subject-matter. Although policies of insurance are not technically specialties, not being under seal, they have nevertheless been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties.<sup>22</sup>

An insurance application is in itself collateral merely to the contract of insurance. When the reference to the application is expressed to be for another purpose, or when no purpose is indicated, to make it part of the policy, it will not be so treated.<sup>23</sup> But where the policy in express terms refers to the application or other papers connected with the risk, and adopts them as part of the contract of insurance,

<sup>18</sup> 6 Pet. (U. S.) 172 (1832); 140 U. S. 226 (1890).

<sup>19</sup> 20 U. C. Q. B. 607 (1861); 160 Mass. 413 (1894).

<sup>20</sup> And. Law Dict. 558; 72 Iowa 416 (1887).

<sup>21</sup> 37 Wis. 539 (1875); 52 Mo. 213 (1873); see subtitles Form of Contract, Policies *supra*.

<sup>22</sup> 13 Mass. 94 (1816).

<sup>23</sup> 31 Iowa 216 (1871).

they become part of the policy.<sup>24</sup> So, where there is no statute governing it, it is not requisite that the policy contain the application; but, in a number of jurisdictions, statutes have been passed to the effect that, unless a copy of the application as it has been signed by the insured be attached to or contained in the policy, such application shall not be considered as part of the contract between the parties.

**8. Judicial Construction.**—Policies of insurance are to be construed like other contracts, so as to give effect to the intention and express language of the parties.<sup>25</sup> The courts are strongly inclined against forfeitures and will construe all the conditions of the contract, and the obligations imposed, liberally in favor of the insured, and strictly against the insurer.<sup>26</sup> The policy is written by the insurers. They use their own language, and surround and barricade their liability under it with such defenses as they choose to adopt. Oftentimes their policies, instead of being simple, intelligible instruments that the average holder can understand and construe, are burdened with a great number of technical stipulations and conditions, buried under ingenious phraseology, which the insured generally learns the import of after he has suffered a loss.<sup>27</sup> Where a contract contains two repugnant provisions, the one printed and the other written, the latter must control the interpretation of the instrument, as it is presumed to express the latest intention of the parties.<sup>28</sup> However, each stipulation in a policy, whether written or printed, should have effect, unless the giving effect to one would destroy another, and then the printed stipulation must yield to the written one.<sup>29</sup>

**9. Commencement of the Risk.**—The event insured against in a life-insurance policy is death. This is denominated the risk, against which the beneficiary is to be protected in virtue of the contract.<sup>30</sup> The risk commences at

<sup>24</sup> 43 N. J. Law 300 (1881).

<sup>25</sup> 57 N. E. Rep. 458 (1900).

<sup>26</sup> 80 Ala. 467 (1886).

<sup>27</sup> 49 Vt. 442 (1877).

<sup>28</sup> 90 Mich. 236 (1892); 97 N. Y. 333 (1884).

<sup>29</sup> 18 La. Ann. 97 (1866).

<sup>30</sup> Bouv. Law Dict.

the moment the company and the insured agree that it shall commence. In the consummation of a contract of insurance it is contemplated that the meeting of the minds of the parties shall be as to the risk and the time it shall commence and continue, as well as upon the subject-matter, the amount insured, and the amount of the premium. Unless provided otherwise in the policy, it will continue in force, and the risk will endure until midnight of the last day. A policy bearing date of the day the premium is paid, takes effect by relation from that day, although not delivered until several days afterwards.<sup>31</sup> Where an application for a life-insurance policy declares on its face that payment of the premium is a condition precedent to the issuing of the policy, the policy is not in force until the premium is actually paid.<sup>32</sup>

**10. Effect of Parol Declarations.**—Parol statements made by an agent prior to or contemporaneous with the delivery of a life-insurance policy to the insured, as to the contents or legal effect of such policy, cannot control plain provisions of the written contract in the absence of fraud or artifice, and where the insured had full opportunity to read the policy. For it is no excuse for a party who has had an opportunity to read or to know the contents of his agreement, or any ground for an abrogation or modification of it, to say that he relied upon the statement or interpretation of it given by the other party to the contract and failed to read it. The very purpose of a written agreement is to supersede oral testimony of its terms, and to shut out the uncertainties that arise from the failing memories and changing interests of living witnesses. Under the law the writing is the highest evidence of the subject, the extent and the manner of contracting.<sup>33</sup> A well-settled principle of law is that parol declarations cannot be received to vary or contradict the terms of a written contract. All that was said between the contracting parties in relation to the terms and stipulations of the contract is presumed to have been merged in the written contract, which is the highest and best

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<sup>31</sup> 23 Wend. (N. Y.) 18 (1840).

<sup>32</sup> 96 N. C. 158 (1887).

<sup>33</sup> 99 Fed. Rep. 856 (1899).



evidence of the contract between the parties, in the absence of any evidence as to fraud, accident, or mistake, at the time of its execution, delivery, and acceptance by the contracting parties.<sup>34</sup>

**11. Indorsement of the Policy.**—An indorsement on the back of a policy may be regarded as part of the contract, provided it be referred to in the policy as constituting part of it. If, however, there be no reference whatever to it in the policy, nothing to show that the parties meant it to be a part of the contract, it will be regarded merely as the act of the insurer, and not therefore binding on the insured.<sup>35</sup>

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#### PREMIUMS

**12. Nature of the Consideration.**—Every contract must have a consideration to support it. In a contract of insurance, the premium, or sum paid by the insured to the insurer, for the insurance, is the consideration. The contract of life insurance is an entire contract, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums.<sup>36</sup> The payment of the annual premium upon a policy of life insurance is a condition subsequent, the non-performance of which may or may not, according to circumstances, work a forfeiture of the policy.<sup>37</sup> But the condition in a policy of insurance, that the instrument shall not be binding until actual payment of the premium, may be waived by the insurers or by a general agent of the company, by delivering the policy without exacting prepayment, it being one inserted for the benefit of the insureds in which they alone are interested.<sup>38</sup> But there is no such waiver when the agent leaves the policy for examination, and requires the party, if he conclude to accept it, to prepay the premium in accordance with the condition.<sup>39</sup>

The premium need not be actually paid, if a condition on the policy do not make the payment of it a prerequisite

<sup>34</sup> 43 Ga. 423 (1871).

<sup>36</sup> 93 U. S. 24 (1876).

<sup>38</sup> 25 Barb. (N. Y.) 189 (1855).

<sup>35</sup> 66 Md. 236 (1886).

<sup>37</sup> 104 U. S. 252 (1881).

<sup>39</sup> 32 N. Y. 619 (1865).

and the insurer do not insist upon it. The promise of the insured to pay, whether express or merely implied from the circumstances attending the delivery of the policy to him, is a valid consideration and will support the contract.<sup>40</sup>

**13. Manner of Payment.**—Life insurance is a cash business; its disbursements are all in money, and its receipts must necessarily be in the same medium. This is the universal usage and the rule of all such companies. An agreement between the agent of an insurance company and an applicant for insurance, whereby the former, without authority from the company, accepted, by way of satisfaction of a premium payable in money, articles of personal property, is a fraud upon the company, and no valid contract against it arises therefrom; for the payment contemplated by the contract is a payment in money.<sup>41</sup> But an insurance company may waive the payment in money, and accept a promissory note, which, in the absence of any express agreement to the contrary, is considered a payment of the premium as contemplated in a condition in the policy that it shall not be valid and binding until the first premium shall be paid to the company.<sup>42</sup>

Where the local agents of an insurance company, who are not authorized to take anything except money in payment of premiums, consent to take notes in lieu of money, such notes must be considered, so far as the insurance company is concerned, as a payment of the premium to the agents who held the notes in lieu of so much money with which they are chargeable, and under such circumstances the non-payment of notes at maturity does not work a forfeiture of the policy or defeat its validity.<sup>43</sup> The premium should be paid in full; if it be not so paid the insurer is not liable.<sup>44</sup> A tender of the premium must be made every time it is due even though the insurer refuse it; failure to tender the premium at any time when it is due works a forfeiture.<sup>45</sup>

<sup>40</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 16, p. 857, and the cases there cited.

<sup>41</sup> 92 U. S. 161 (1875); 81 Ind. 300 (1882).

<sup>42</sup> 55 Minn. 95 (1893).

<sup>43</sup> 101 Cal. 627 (1894).

<sup>44</sup> 74 N. C. 22 (1876).

<sup>45</sup> 52 Tex. 504 (1880).

**14. Notice of Premium Falling Due.**—The authorities are at variance as to whether or not an insurer be compelled to give notice of the amount of the premium due, and when it should be paid. One line of authorities holds that where, from the course of dealing between the parties, the insured has the right to believe that the insurer would continue the custom it had used in the past and give notice of the amount and time of payment, the insurer cannot set up the failure of the insured to pay the premium when the insurer had neglected to notify the insured.<sup>46</sup> If it be the practice of the insurers to give notice before each premium is due and they omit it on the occasion for which the policy is forfeited, or if the insurers so deal with the insured as to induce a belief that the clause of forfeiture will not be insisted on, and thus put the insured off his guard, the insurers cannot take advantage of a default which they encouraged.<sup>47</sup> An insurance company will not be permitted to insist upon a forfeiture, if by an agreement, either express or implied by the course of its conduct, it lead the insured honestly to believe that the premiums or assessments will be received after the appointed day.<sup>48</sup> The other line of authorities holds that where the charter or by-laws do not provide for the giving of notice of the premium being due, there is no excuse for non-payment on account of notice not being received, as there is no obligation upon the insurer to give such notice.<sup>49</sup> Where it is the custom of the insurer to give notice to the insured that the premium or premium note is about to fall due, a neglect by the insurer to give such notice will not save the policy from forfeiture, if the insured fail to pay the premium or premium note when due. unless the failure to give such notice be fraudulent, and for the purpose of throwing the insured off his guard.<sup>50</sup>

**15. Credit for Premiums.**—An agent for an insurance company authorized to take and approve risks, and to insure, is by general usage also authorized to allow credit

<sup>46</sup> 96 U. S. 572 (1877); 33 Hun (N. Y.) 138 (1884).

<sup>47</sup> 61 Pa. 107 (1869).

<sup>48</sup> 117 Ind. 97 (1888).

<sup>49</sup> 63 Md. 213 (1884).

<sup>50</sup> 5 Big. Life and Acc. Ins. Cas. 8 (1876).

for the premium.<sup>51</sup> Where a policy is delivered without requiring payment, the presumption is that a credit was intended. Where credit is intended, the policy is valid though the premium were not paid at the time the policy was delivered;<sup>52</sup> where credit is given by the general agent and the amount is charged to him by the company the transaction is equivalent to payment.<sup>53</sup>

Where a policy of insurance provided that a note given for the premium should operate as a payment and keep the policy in force only until the note matured, and that during the period in which a default of payment existed after the note matured, the policy should be void, but that if the insured should pay the note after its maturity, the liability of the company on the policy should again attach, and be in force after such payment, a loss occurred under the policy so worded during the time the note was dishonored, and a tender of payment was made after the loss took place, and the insured could not recover against the insurer the loss he had suffered.<sup>54</sup> A stipulation in an insurance policy that the company shall not be liable for any loss sustained while any premium note remains past due and unpaid, is one which the company has a right to make, and, if inserted without any fraud, misrepresentation, or concealment, is binding upon the insured, and its violation will cause the policy to lapse.<sup>55</sup>

If an insurance company deliver a policy to the insured before the payment of the premium, such a delivery is *prima facie* evidence that the conditions in the policy which provide that the insurance shall not take effect until the premium has been paid, have been waived, and an intention to give credit will be presumed.<sup>56</sup> An insurer has the right to waive a cash payment of the premium and dues required in the policy and accept in lieu thereof an order for the same, given by the insured on a third person; and when it does so, and gives a receipt for the amount, it cannot defeat a recovery upon the policy, and insist on a forfeiture as for

<sup>51</sup> 92 U. S. 161 (1875).

<sup>52</sup> 12 Wall. (U. S.) 285 (1870).

<sup>53</sup> 20 Fed. Rep. 232 (1884).

<sup>54</sup> 125 Ind. 189 (1890).

<sup>55</sup> 76 Mich. 641 (1889).

<sup>56</sup> 44 Ill. App. 268 (1892).

non-payment of the premium and does, without having given the insured notice of the non-payment of the order."

16. *Who Should Pay the Premium.*—The person insured or his agent should pay the premium. A third person authorized, having no interest, has no right to pay the premium. It is not absolutely essential that the insured himself should pay the premium. In case of his sickness or disability preventing his payment of the premium, it should be paid by some one for him. The payment of the premium is an act which can be performed by any person acting as agent for the insured; it does not depend upon his continued capacity or existence. So, in case a person insured fails to pay the premium that is due on account of sickness, the policy will be forfeited and the sickness will not be held a good defense for the failure to pay.<sup>57</sup> When a person, not the real beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases: (1) by contract with the beneficial owner; (2) by reason of the right of recovery as an indemnity out of their true property for money expended by them in its preservation; (3) by subrogation to the right of some person, who at the request of insured, has advanced money for the preservation of the property; (4) by reason of the right of a mortgagee to add to his charges any money paid by him to preserve the property.<sup>58</sup>

17. *To Whom Payment Should Be Made.*—A payment to the insurer or to his agent binds the insurer. The delivery of a policy of insurance by the insurer to an agent for delivery to the insured, gives to that agent an apparent authority to receive payment of the premium, and payment to such agent is sufficient to bind the insurer.<sup>59</sup> A payment of a premium to an agent is a sufficient payment to the company under a policy providing that if the payment be not made here the home office within thirty days after the date

<sup>57</sup> 114 N. D. 382 (1895).  
<sup>58</sup> 44 N. Y. 254 (1871).

<sup>57</sup> 22 Ch. Div. (Eng.) 552 (1882).  
<sup>58</sup> 44 Ill. App. 265 (1892).



of the policy it shall be void and of no effect.<sup>61</sup> Where the premium note provides that payment thereof shall be made at a particular place, and the policy provides that no agent of the company, except the general agent at that place, shall have power or authority to waive or alter any of its terms or conditions, a payment made by the insured to a local agent of the company at a different place is not a payment to the company.<sup>62</sup> A receipt of the premium by the agent of the insurer binds the insurer, though the agent convert it and a policy be never actually issued.<sup>63</sup> A notice on the policy that such receipt is not valid, unless it be signed by certain officers of the company at the same time, will not affect the rule.<sup>64</sup>

An insurance agent may pay the premiums himself, and the party insured may thus become his debtor; and, if a policy be issued to the party insured, he can recover in case of loss, even if he fail to pay the agent.<sup>65</sup> But it is not a payment to the insurer to receive a policy from the agent without paying the premium, and afterwards by way of payment pay a private debt of the agent upon the assurance that the agent has paid the insurer the premium.<sup>66</sup> It is a well-settled rule that, in the absence of any extrinsic proof, an insurance broker is held to be the agent of the insured, and the broker must pay the insurer to make the contract binding.<sup>67</sup>

**18. Payment When Insurer Is Insolvent.**—A person holding a policy of life insurance does not forfeit his policy by omitting to pay annual premiums thereon after the company has ceased to do business, transferred all its assets, and become insolvent. An insurance company has no power to turn its policy holders, against their consent, over to another company.<sup>68</sup>

**19. Non-Payment in Case of War.**—Policies of life insurance are extinguished by the non-payment of premiums,

<sup>61</sup> 87 Ind. App. 514 (1899).

<sup>62</sup> 78 Cal. 619 (1889).

<sup>63</sup> 2 Biss. (U. S.) 833 (1870).

<sup>64</sup> 66 N. Y. 23 (1876).

<sup>65</sup> 113 Pa. 591 (1886).

<sup>66</sup> 18 Pa. Co. Ct. 203 (1893).

<sup>67</sup> 21 Misc. (N. Y.) 671 (1897).

<sup>68</sup> 92 N. Y. 105 (1883).

though caused by the existence of war, and an action will not lie for the amount insured thereon. But such non-payment, being caused by a public war, is not the fault of the insured, and he has an equitable right to have the amount of his payment restored to him, subject to a deduction for the value of the insurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.<sup>69</sup>

**20. Wrongful Refusal to Accept Premiums.**—If an insurer improperly refuse to accept the premiums under a plea that the policy is void, an action may be maintained against him for damages, and it seems that the rule of damages will not be confined to the amount of the premiums paid with interest, but the amount allowed to be recovered is the amount necessary to secure new insurance.<sup>70</sup>

**21. Paid-Up Policies.**—A paid-up policy is one on which all the annual premiums are paid, or considered as paid, at one time.<sup>71</sup> A policy of insurance containing a provision that a default in payment of premiums shall not work a forfeiture, but that the sum insured shall then be reduced and commuted to the annual premiums paid, confers the right on the insured to convert the policy at any time, by notice to the insurer, into a paid-up policy for the amount of premiums paid.<sup>72</sup> A request for the issue of a paid-up policy should be made while the original policy is in full force, and not after it has become forfeited for non-payment of premiums.<sup>73</sup> For, the time of the surrender of the policy is of the essence of the contract, and the insured is not entitled to a paid-up policy on the surrender of the original policy after it has expired by non-payment of the premium.<sup>74</sup>

The insured is entitled to a paid-up policy for an equitable amount upon the basis of the premium which has already been paid; for, a part of each premium paid on a life policy is absorbed in paying the running expenses of the company.

<sup>69</sup> 88 Mo. 566 (1886).

<sup>70</sup> 1 Tex. Civ. Cas. 348 (1880).

<sup>71</sup> And. Law Dict. 559.

<sup>72</sup> 111 U. S. 264 (1883).

<sup>73</sup> 103 Pa. 177 (1883).

<sup>74</sup> 20 Fed. Rep. 886 (1884).

Another part compensates the insurer for the risk during the period for which the premium is paid; another part of each premium is retained by the insurer, accumulating on interest, to respond to the demand of the policy when it matures or becomes a claim. In issuing a paid-up policy it will be seen that, inasmuch as a part of each premium paid is necessarily consumed in the expenses of the company, and another part in meeting the loans on other policies and in dividends, it would not pay the insurer to issue a paid-up policy for the entire amount of the premium paid.<sup>75</sup> The right of the insured does not depend on the surrender of the policy and the taking out of a new paid-up policy within the time specified in the policy; if he do so within a reasonable time, he can recover.<sup>76</sup> But, in some jurisdictions, the insured is bound to comply with the requirement as to the time mentioned in the policy within which he should return his policy and secure a new paid-up one. Failure to do so will relieve the insurer of liability.<sup>77</sup>

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### PROVISIONS IN POLICIES

**22.** Life-insurance policies are substantially alike in form and conditions, at least in the United States, although they differ in phraseology, the number of conditions, and the manner of stating them. Usually, a life policy contains the names of the parties—insurer, insured, and beneficiary—the amount of premium and mode of payment, the period of insurance, the time of payment, and the conditions on which the policy is forfeited.<sup>78</sup>

Embraced in the conditions on which the policy is forfeited are fraud, misrepresentation, concealment in the application; non-payment of premium at the time fixed; travel or residence in certain specified regions; death by suicide, by the hands of justice, in a duel, or in consequence of a violation of law; also, certain kinds of hazardous employment, such as in the military or naval service, in a

<sup>75</sup> 8 Lea (Tenn.) 499 (1881); 41 Hun (N. Y.) 303 (1886).

<sup>76</sup> 67 Me. 85 (1887); 79 Ky. 403 (1881).

<sup>77</sup> 93 N. Y. 70 (1883).

<sup>78</sup> Bliss Life Ins. (2d Ed.), p. 330.

powder mill, or at sea. Frequently a condition as to habits, such as intemperance, is included. "In special cases," says an authority, "some other conditions may be added but they are all of the same general nature. The legal effect of these conditions, where the policy is obtained upon the life of one over whose proceedings the beneficiary has no control, or of whose acts he may be wholly ignorant, may be very serious. The American policies, in terms, make no distinction between such cases and those in which the policy is issued directly to the insured. Under both, a violation of the condition forfeits the policy. The English companies, however, adopt a more liberal and equitable system, by making distinctions in favor of *bona-fide* holders of the policies, similar to those in case of suicide."<sup>79</sup>

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#### CAUSES OF DEATH AFFECTING LIABILITY

**23.** The more frequent exceptions, or excepted causes of death, that exempt the insurer from liability are: (1) Death in violation of law; (2) while under the influence of intoxicating drink, opiates, or narcotics; (3) death while in military or naval service; (4) death by suicide.

**24. Death in Violation of Law.**—In a policy of insurance where there is a proviso that the policy shall be void in case the insured dies while engaged in, or as the consequence of, a violation of law, the clause, as a general rule, is held to refer to violation of the criminal law, but, in some jurisdictions, applies equally to the civil law. Whatever be the nature of the violation of the law urged by the insurance company, as avoiding the policy, it seems to be clear that a relation must exist between the violation of law and the death, to make good the defense, that the death must have been caused by the violation of law to exempt the company from liability.

It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the insured was violating the law, if the death

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<sup>79</sup> Bliss Life Ins. (2d Ed.), p. 331.

occurred from some cause other than such violation. It would hardly be contended that if one should intentionally and deliberately kill another in consequence of some slight violation of a civil right, such as walking across his land without his permission, or other trivial trespass, the case would fall within the proviso, for no one would hesitate to say that, in the case supposed, the unlawful act of the deceased was a totally inadequate cause for killing. Yet, between such an act as that, and one which would in law justify the killing of the offender, there is an infinity of supposable cases involving different degrees of provocation, which cannot be measured so as to determine, as matter of law, their adequacy to produce a fatal result.<sup>80</sup>

Where a contract of life insurance provides that it shall be void if the insured die "in violation of or attempt to violate any criminal law," and the insured dies from the effect of taking poison with intent to take his life, his beneficiaries can recover; the fact that the insured committed suicide is no defense within the conditions of the policy, suicide in most jurisdictions not being a crime, although the attempt to commit suicide is.<sup>81</sup> Where a policy exempts the insurer from liability for death resulting from a violation of the law, there can be no recovery for a death caused by an abortion voluntarily submitted to, for which there was no medical necessity.<sup>82</sup>

## **25. Death While Intoxicated or by Narcotics.**

Where a clause in a policy provides that the insurer shall not be liable in case of the death of the insured while under the influence of intoxicating drink, if the death of the insured occur while he is under such influence, this alone avoids the policy without regard to the question whether that condition were the natural and reasonable cause of the death, or in any manner contributed thereto.<sup>83</sup> Where a policy provided against the death of the insured, if the insured "shall become so far intemperate as to impair his health," if the substantial

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<sup>80</sup> 45 N. Y. 422 (1871).

<sup>81</sup> 167 N. Y. 537 (1889).

<sup>82</sup> 120 Mass. 550 (1876).

<sup>83</sup> 66 N. Y. 441 (1876).



cause of the death of the insured were an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was held to be impaired within the meaning of the provision, although previously to his last illness he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate. Under such a provision it is oftentimes extremely difficult to say whether a man's health have been impaired by alcoholic stimulants or by other causes, and such cases are generally decided by the facts and the testimony of medical experts in each particular case.<sup>84</sup>

Where a policy of insurance provides that its benefits shall not extend to death caused "by taking poison," it was held that an involuntary taking of poison by mistake, causing death, is within the provision of the policy.<sup>85</sup> But it has also been decided that such words mean the voluntary intentional taking of poison, and do not include cases of accidental poisoning by mistake, but do include death from voluntarily taking poison without any suicidal intent.<sup>86</sup> The use of intoxicating liquors, opiates, or narcotics in the manner and amounts prescribed by a physician is not such use as will avoid a certificate of insurance providing that if death be caused by the use of narcotics, there can be no recovery thereon. Narcotics as well as other drugs are used by physicians to counteract diseases, and though all are to some extent poisonous, yet the effect is to prolong life, and relieve the afflicted party for the time being, so that the use of such drug under the advice of a physician and according to directions, without excess, could not be considered a violation of the terms of the policy, but a duty of the insured.<sup>87</sup>

**26. Death While in Military or Naval Service.**—A provision in a policy of life insurance forfeiting the policy in case the insured shall enter into any military or naval service without the consent of the company includes only such service as will require the person entering into it to do duty as a

<sup>84</sup> 123 U. S. 739 (1887).

<sup>85</sup> 102 Pa. 230 (1883); 89 Fed. Rep. 685 (1898).

<sup>86</sup> 160 Ill. 642 (1895).

<sup>87</sup> 58 S. W. Rep. 241 (1900).

combatant. An employment, therefore, by military authorities in constructing a railroad bridge is not within the prohibitions of the policy, and does not invalidate it. Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense, as most advantageous to the insured, as well as all other provisions therein. The company frames the policy and chooses the language. If there be anything uncertain, it is the right of the insured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants.\*\*

**27. Death by Suicide.**—Death by self-destruction is the most important in its relation to life insurance of any of the excepted causes mentioned. The cases dealing with the question are numerous, but unfortunately are not uniform. The first question to be considered is whether a policy of life insurance cover death by suicide when it is silent on the subject of suicide. A case in the supreme court of the United States took the view under such a policy that suicide was not contemplated by the parties as coming within the scope of the risk. The court said that, if the contract had expressly included the risk of suicide, it would, as to that point, have been invalid as against public policy, and that, therefore, it could not be regarded as covering that risk when it was silent. But this conclusion is by no means universally accepted. The validity of suicide clauses in policies, specially providing that the company shall be liable in case of suicide, has been sustained in various jurisdictions. Especially is it so held in cases where the wife or children are the beneficiaries, for in such case the insured has no right to perpetrate a fraud upon the beneficiaries by committing an act which will prejudice their interests under the policy. But a secret intent on the part of the insured, at the time of taking out a policy on his life, to commit suicide vitiates the policy even as against the beneficiary named therein, although there be no provision

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\*\* 48 N. Y. 34 (1871).

for forfeiture in case of suicide. For, a secret intent of this kind would amount to a fraud, and as fraud vitiates all contracts, this defense, if established, would defeat a recovery on the policy. Being void in its inception, no rights would accrue under the contract to any person.<sup>89</sup>

Where the policy is silent as to suicide, it will not for such an act be avoided as against the wife of the deceased, who is nominated the beneficiary.<sup>90</sup> Where there is no express provision in the policy that in the event of the insured dying by his own hand the policy shall become void, the policy is not vacated by the circumstance of his having died by his own hand while in a state of temporary insanity.<sup>91</sup> It is the tendency of the courts to construe a life-insurance policy in favor of the insured so far as it is possible, and the courts will apply that rule to a case of death by suicide, to make the policy cover the death if it be possible.<sup>92</sup>

There is a great diversity of judicial opinion as to whether self-destruction, by a man in a fit of insanity, be within the condition of a life policy, where the laws of the exemption are that the insured "shall commit suicide" or "shall die by his own hand." In the United States, the insurers have, by inserting the clause "sane or insane," stopped the question from being an open one any longer. The provision was held to be valid. Neither the policy of the law nor sound morals forbids the insurers from making it. Under this wording and the interpretation of it by the courts, if the insured kill himself, the policy is void, even though he be insane and unconscious of the nature of the wrong which he is doing.<sup>93</sup>

28. The rules differ in England and the United States in cases of policies with clauses against suicide, where no exception is made as to the insane condition of the insured. In the United States, if one whose life is insured intentionally kill himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he do understand its

<sup>89</sup> 108 Iowa 117 (1899).

<sup>90</sup> 183 Pa. 563 (1898).

<sup>91</sup> 30 L. J. Ch. (Eng.) 511 (1861).

<sup>92</sup> 40 Ohio 217 (1883).

<sup>93</sup> 93 U. S. 284 (1876).

physical nature, consequence, and effect, it is not "suicide or self-destruction," or "dying by his own hand," within the meaning of those words in a clause excepting such risks out of the policy, and containing no further words expressly extending the exemption to such a case.<sup>94</sup> The English rule is that the terms of the condition, "suicide" or "self-destruction," include all acts of voluntary self-destruction, and, if the person insured voluntarily kill himself, it is immaterial whether he were or were not at the time a responsible moral agent.<sup>95</sup>

In contracting as to life insurance, it is competent for parties to provide that self-destruction by the insured, whether sane or insane, shall avoid the contract. Such a provision covers a case of intentional self-destruction by one who understood the physical nature and consequence of the act which caused his death, although his mind was so far impaired that he was not conscious of the moral quality or consequences of such act.<sup>96</sup> Where the policy provided that it should be null and void in case the insured "shall under any circumstances die by his own hand," in an action to recover upon the policy where the insured had killed himself, it was decided that such wording was very indefinite. The wording was held not to cover death while insane, although the insured intended to take his life and understood the physical nature and effect of his act.<sup>97</sup> The mere fact that the insured was insane when he took his life is not of itself sufficient to defeat the recovery. In order to defeat a recovery, the insurer must show that the insured knew the physical nature of the act he was about to commit, and that it would result in self-destruction; but it is not necessary for the insurer to show that the insured was either legally or morally responsible for his acts.<sup>98</sup>

29. Where there is a provision in the policy that it will be void if the insured die by self-destruction, sane or insane, if he administer poison by his own hand, with the purpose

<sup>94</sup> 150 U. S. 468 (1893).

<sup>95</sup> 3 C. B. (Eng.) 436 (1846).

<sup>96</sup> 57 Pa. 936 (1899).

<sup>97</sup> 40 Ohio 217 (1883).

<sup>98</sup> 87 Ky. 541 (1888).

and intention of taking his life, the policy is void. If such poison be taken hastily or deliberately with intent to end life, whether sane or insane, there can be no recovery on the policy. The conscious and voluntary act on the part of the insured in taking the poison with intent to take his own life, which resulted in death, is held sufficient to defeat the claim of insurance, whether such act be deliberately committed or not.<sup>99</sup>

Where the policy provides against liability in case of the insured's suicide, whether he be sane or insane, and the insured's death is caused by accidentally taking an overdose of morphine, the insured can recover, if the insurer cannot prove he took it with intent to end his life. It is a proposition of law supported by authority as well as reason that this and similar clauses in policies of insurance, conceding them to be valid, are not infracted by the accidental and mistaken taking an overdose of medicine or poison, or by the unintentional taking of his life by the insured.<sup>100</sup>

Where a policy of life insurance contains a condition avoiding it in case the insured should "die by his own hand or act, voluntary or otherwise," this does not cover the case of a death purely accidental, caused by a poison taken by the insured through mistake or ignorance, he being at the same time sane; it seems that the act stipulated against is suicide, and the words "voluntary or otherwise" preclude one claiming under the policy, if death were suicidal, from setting up insanity.<sup>101</sup>

A policy of insurance may be so worded as to exclude liability if within two years after the issue of the policy the insured shall end his life, unless insane. A large number of life-insurance companies now word their policies this way. The object is to guard against the danger of persons taking out policies with a view to commission of suicide. The thought is that by giving the insured two years to think it over, between the time he effects the policy and the time his representatives will be permitted to recover in the event

<sup>99</sup> 43 N. E. Rep. 277 (1896).

<sup>101</sup> 85 N. Y. 317 (1881).

<sup>100</sup> 57 S. W. Rep. 415 (1899).



of his self-destruction, the danger of self-destruction is largely eliminated.<sup>102</sup>

Where a person insures his life with the purpose of committing suicide, so as to clear up his debts, by assigning the policy to his creditors, there will be no recovery allowed on the policy, even though death by suicide be not provided against in the policy. The defense of the insurer in such a case is the fraud, and suicide the ultimate agency by which the fraud was accomplished.<sup>103</sup> An insurance company can stipulate in its policy of life insurance that in case the insured should die by his own hand the policy should be void, but that, if at the time of taking his life, the insured were insane, the company would pay the sum insured, or refund the premium actually received with interest, according to its discretion.<sup>104</sup>

#### BENEFICIARIES

**30. When the Interest Vests.**—Every person has an insurable interest in his or her own life, and can effect insurance on it and designate any one to be the beneficiary under such policy, who thereby takes a vested right in the policy. Under an ordinary life policy, an interest vests in the person for whose benefit it is taken out when the policy is delivered, subject to be divested or forfeited upon non-payment of the premium, as the policy may prescribe, and that on the death of the beneficiary, either before or after the death of the insured, the fund arising therefrom goes by bequest or by succession, as other personal assets of the beneficiary.<sup>105</sup> The general rule is that the right to a policy of insurance and the money to become due under it vests in the person named in it as the beneficiary immediately upon its issue, and that this interest, being vested, cannot be transferred by the insured to any other person. The vested right cannot be divested without the consent of the person invested with it. This is so as to insurance in both mutual and ordinary life-insurance companies. But it does not hold true, however,

<sup>102</sup> 66 N. W. Rep. 157 (1896).

<sup>103</sup> 123 N. Y. 85 (1890).

<sup>104</sup> 24 Fed. Rep. 159 (1885).

<sup>105</sup> 58 Ala. 133 (1877).

where the contract of insurance provides that the insured may change the beneficiary; in such case it vests conditionally only. The right of the one named in the policy is then subject to be defeated by the terms of the very contract naming him as the beneficiary. It is a condition of the contract, and his right is therefore subject to it.<sup>106</sup>

**31. Designation a Matter of Choice.**—A policy that gives the insured power to make the policy payable as he may direct may be made payable to any person the insured chooses, whether a member of his family or not.<sup>107</sup> When the policy designates children, it does not include grandchildren, or lineal descendants remote in degree, but it must be taken in the ordinary, popular signification, as comprehending immediate descendants only.<sup>108</sup> Yet, if it be made payable to the children of the insured, and the only child be an adopted one, and circumstances show that the parties intended that such child should be included in the benefits of the policy, it would be entitled to the proceeds of the policy.<sup>109</sup> Where a policy was worded for the benefit of the insured's wife and their children, it was held to include children by the first, as well as the children by the last, wife.<sup>110</sup>

Where a policy is made payable to a man's legal heirs, and he dies leaving a widow and children by his widow and by two other wives, the widow would take an equal share with the children; her rights are neither superior nor inferior to those of the other joint beneficiaries, but are equal.<sup>111</sup> But where a policy of insurance is taken out for the benefit of the insured's wife and children, naming the wife, and the wife dies before the insured, who contracts a second marriage and has children by his second wife, it is held that only the children of the first marriage could participate in the proceeds of the insurance upon the death of the insured.<sup>112</sup>

In Iowa, where a man took out a life-insurance policy payable to his legal heirs, and left surviving him a widow

<sup>106</sup> 92 Ky. 324 (1891).

<sup>107</sup> 70 Iowa 360 (1886).

<sup>108</sup> 54 Ala. 688 (1875).

<sup>109</sup> 73 Me. 25 (1881).

<sup>110</sup> 77 Va. 163 (1883).

<sup>111</sup> 83 Ind. 55 (1882).

<sup>112</sup> 51 How. Pr. (N. Y.) 221 (1876).

and one child, the widow was not allowed to participate in the insurance and the whole amount of the policy was payable to the child. The word *heirs* was held not to include the widow. A similar decision was made in Illinois.<sup>113</sup> In a technical sense it would not include the widow, but some courts do not apply the technical construction.<sup>114</sup> In New York it has been held to include the widow; so, in Massachusetts and Connecticut.<sup>115</sup> The difficulty of this question, however, has been largely eliminated by statutes in different states regarding the distribution of personal property.<sup>116</sup>

**32. Interest Held in Trust.**—A life-insurance policy issued to one for the benefit of himself, or his executors, becomes upon his death a part of his estate, like any other chose in action.<sup>117</sup> Where the person insured has designated a beneficiary and dies, and the insurance is paid to decedent's administrator, such administrator will hold the fund as trustee for the beneficiary,<sup>118</sup> and where a provision in a policy of life insurance provided that, under certain circumstances, payment of the amount upon the death of the insured should be made to the guardian of his children if they were under age, such a contract to pay the guardian of the infant beneficiaries means a guardian legally authorized to receive and discharge the debt, and a guardian possessing this authority, whether a general or chancery guardian, a testamentary guardian, or a guardian *ad litem*, is a guardian to whom, under the policy, payment could be lawfully made.<sup>119</sup> Where a policy of life insurance was taken out for the benefit of a partnership, to which the party insured was indebted, and made payable to one of the partners, as trustee, it was held that the death of such partner as trustee could not affect the rights of the real beneficiary living at the death of the insured.<sup>120</sup> If a policy be made payable to the wife of the party procuring the same, or his legal representatives, the wife has a vested interest in the policy during her life

<sup>113</sup> 86 Ill. 251 (1878).

<sup>114</sup> 55 Hun (N. Y.) 257 (1889).

<sup>115</sup> 60 Conn. 240 (1894).

<sup>116</sup> 100 Mich. 214 (1894).

<sup>117</sup> 86 N. C. 260 (1882).

<sup>118</sup> 60 N. H. 54 (1880).

<sup>119</sup> 14 N. E. Rep. 808 (1888).

<sup>120</sup> 105 Cal. 321 (1894).

but in the event of her death before that of the insured, the other alternative of the designation takes effect, that is, "to his legal representatives," and the policy stands the same as if her name were never inserted. The husband then has the same power over it as if it had been originally payable to himself, his executors, and administrators, and with the consent of the insurer, he may surrender the same, and take out a new one payable to another person.<sup>121</sup>

### WARRANTIES

**33. Definition and Kinds.**—A warranty, in insurance law, is a stipulation inserted on the face of a policy, on the literal truth or fulfilment of which the validity of the entire contract depends. The stipulation is considered to be on the face of the policy, although it may be written on the margin, transversely, or on a subjoined paper referred to in the policy.<sup>122</sup> Warranties may be affirmative or promissory. An *affirmative warranty* relates to something existing or that has existed previous to the time of insurance; it is then in the nature of a condition precedent.<sup>123</sup> A *promissory warranty* is where the insured undertakes to perform or abstain from some act in the future; it is then in the nature of a condition subsequent.<sup>124</sup>

**34. Doctrine as to Truth of Warranty.**—In the matter of warranties, it is immaterial whether the insured in making the warranty acted in good or bad faith, or whether he believed the facts warranted to be true or not. If the facts warranted were false, the insured cannot recover.<sup>125</sup> The general doctrine is that, in actions on policies of insurance with a warranty of the truth of the facts, the validity of the contract depends on the truth of the warranty, and that the engagement of the policy holder is absolute that the facts shall be as they are stated when his rights under the policy attach.<sup>126</sup>

<sup>121</sup> 110 Ill. 551 (1884).

<sup>122</sup> 30 N. Y. 136 (1864).

<sup>123</sup> 39 Ind. 475 (1872).

<sup>124</sup> 9 Ind. App. 443 (1893).

<sup>125</sup> 98 Pa. 41 (1883).

<sup>126</sup> 196 Pa. 314 (1900).

**35. When Made in the Application.**—Where by the terms of the contract the answers to the questions propounded in the application for insurance are expressly agreed to be warranties, the application will be made part of the contract, and under such circumstances the warranty is of the same significance as if contained in the policy. In such case, the warranty must be strictly complied with. It is of the nature of a condition precedent, and no inquiry is allowed into the materiality or immateriality of the fact.<sup>127</sup> In order to constitute any statement or promise of the insured a warranty, it must be made part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is to be found.<sup>128</sup> A warranty on the margin of a policy must be strictly followed, as much as if written in the body of the instrument.

**36. How Construed.**—In a policy of life insurance, in which it is provided that if the declarations of the insured, upon the faith of which the policy is made, shall be found to be in any respect untrue, that then the policy shall be void, the entire truthfulness of such declarations is thereby made matter of warranty or condition precedent to a recovery upon the policy; and, to avoid the policy it is not necessary that the declarations should be fraudulent as well as false, nor that they should be on a matter material to the contract, nor that the insurers should have issued the policy on the faith of the declarations.<sup>129</sup> Where a policy, together with the application, contains a provision that, if the declarations made in the application for the policy or any statement respecting the person or family of the person whose life is insured, submitted by such person to the insurer, upon the faith of which declarations or statements the policy is issued, should be found in any respect untrue, then in every such case the policy shall be null and void, such statements made under such a provision are warranties, and, if untrue in fact, the contract fails.<sup>130</sup>

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<sup>127</sup> 147 Mo. 561 (1898).

<sup>128</sup> 67 Tex. 71 (1886).

<sup>129</sup> 4 Daly (N. Y.) 296 (1872).

<sup>130</sup> 5 Big. Life and Acc. Ins. Cas. 401 (1875).



In some jurisdictions, statutes have been passed making statements of description in the application *representations* and not warranties, and only permitting a policy to be defeated when the misrepresentation is material or fraudulent.<sup>131</sup> The parties have the right to make their own contracts upon such terms and conditions as they see fit. And, if the insured choose to make his representations warranties, the question of their materiality becomes important, or rather the insurer is relieved from showing, and the insured is estopped from denying, that they are material to the contract; and no court can be permitted to say that the insurer did not deem them material to the risk, or that he would have made the contract upon other terms than he has made it. There may be many matters which the insurer may deem, and which experience may have satisfied him, are material to the risk, but the materiality of which he might not be able to prove to the satisfaction of a jury; and he has a right to refuse to insure, unless upon the terms that such matters shall be made warranties by the insured; and, when so made, it is an agreement on the part of the insured, not only to warrant the truth of such matters, but that they are material to the contract, and that, if false, the contract shall be void.<sup>132</sup>

**37.** In construing a policy, the courts lean in favor of that construction which makes a statement of the insured a representation rather than a warranty, and when taking the whole policy and papers referred to in it as part of it together, it is doubtful whether the parties intended that the statements or answers of the insured should be regarded as representations or warranties, the court will construe them to be representations and not warranties.<sup>133</sup> It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the insured will be construed to be a representation and not a warranty, if it be at all doubtful in meaning, or the contract contain contradictory

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<sup>131</sup> 122 N. C. 92 (1898).

<sup>132</sup> 27 Mich. 429 (1873).

<sup>133</sup> 25 W. Va. 622 (1885); 120 U. S. 183 (1887).

provisions relating to the subject or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the insured the burdens of a warranty, and will neither create nor extend a warranty by construction. Where statements are intended to be warranties, they will be strictly construed to be such, and whether they be true or not is immaterial. But, where there is any doubt as to the meaning of the contract of insurance, it is presumed that the statements of the applicant are to be regarded as representations, and not as strict warranties.<sup>134</sup> Where a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the insured the obligations of a warranty.<sup>135</sup>

Statements made by the insured, to constitute warranties, must enter into and form part of the contract itself; and, where they are contained in the application, they are always construed as representations, unless, by the express provisions of the policy, the application is made a part thereof, and the intent is manifest to give them the effect of warranties. Besides, as warranties must be literally fulfilled, the courts have always manifested a strong indisposition to regard any statements made by the insured as warranties, unless such were the obvious purpose of the parties to the contract.<sup>136</sup> Even though a warranty, in name or form, be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the insured, so often merely categorical, will be construed not to be a warranty of immaterial facts, stated in such answers, but rather a warranty of the insured's honest belief in their truth, or in other words, that they were stated in

<sup>134</sup> L. R. 9 Q. B. (Eng.) 328 (1874); 58 Fed. Rep. 940 (1893).

<sup>135</sup> 95 U. S. 673 (1877).

<sup>136</sup> 77 Fed. Rep. 117 (1896).

good faith. The strong inclination of the courts is thus to make these statements, or answers, binding only so far as they are material to the risk, where this can be done without doing violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary.<sup>137</sup> The same rules are to be applied to a life-insurance contract in construing a warranty as are applied to other contracts, to ascertain the mutual understanding of the parties.<sup>138</sup>

**38. Effect of Breach of Warranty.**—Where neither a policy of life insurance, nor the application upon which it is granted, contains any stipulation that a breach of warranty contained in the application *ipso facto* nullifies the policy, the breach of such warranty renders the policy voidable, but does not render it void, nor entitle the insurer to defeat a recovery upon it, unless he have reasonably manifested an intention to rescind the contract, and returned, or tendered a return, of the premium. For, where a policy becomes void by a failure of the warranty, the insured is entitled to a return of the premium, if there be no actual fraud. But the parties may agree by a stipulation in the contract that where a breach of warranty occurs, the insurer is not to return the premiums.<sup>139</sup>

#### REPRESENTATIONS

**39. Definition and Nature.**—A representation, in insurance law, is the act of stating facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other to enter into the contract.<sup>140</sup>

**Misrepresentation** is the statement of something as a fact which is untrue in fact, and which the insured states, knowing it not to be true, with an intent to deceive the insurer, or which he states as positively true, and which has a tendency to mislead, such fact in either case being material to the

<sup>137</sup> 80 Ala. 467 (1886).

<sup>138</sup> 1 Woods (U. S.) 674 (1874); 111 Cal. 503 (1896).

<sup>139</sup> 44 Ohio 31 (1886); 67 Fed. Rep. 490 (1895).

<sup>140</sup> Bouv. Law Dict.

risk.<sup>141</sup> A misrepresentation by a person insured in his application for insurance will not avoid the policy unless material to the risk.<sup>142</sup>

**40. Distinguished From Warranty.**—A representation differs from a warranty in this: While the latter must be true, the former need be only materially true—true so far as the representation was material to the risk. A fact is to be deemed material if a knowledge of it would have induced the insurer to have refused the risk or to have charged a higher rate of premium for taking it.<sup>143</sup> Thus, if a person effecting a policy of insurance say “I warrant” such and such things there stated, and that is a part of the contract, then, whether they be material or not is quite unimportant. The party must adhere to his warranty, whether material or immaterial. However, if he make no warranty at all, but simply make a certain statement, if that statement have been made *bona fide*, unless it be material, it matters not whether it be false or not false. Indeed, whether made *bona fide* or not, if it be not material, the truth is a matter of no consequence.<sup>144</sup>

**41. Fraudulent Misrepresentations.**—Every misrepresentation is fraudulent which induces the insurer to insure when, had such misrepresentations not been made, he would not have insured.<sup>145</sup> To render a policy void, it is not necessary that there should be a wilful misrepresentation or suppression of the truth; a mere inadvertent omission of facts, material to the risk, and such as the party should have known to be so, will avoid it.<sup>146</sup> It is not material whether they were made by design or mistake, if made of facts natural to the risk; the question of good faith does not enter into the matter. Where the statements, however, are not material to the risk, the misrepresentation must be by design and fraudulent.<sup>147</sup> A material misrepresentation will prevent a recovery on the policy, for a misrepresentation takes away

<sup>141</sup> 98 Mass. 416 (1853).

<sup>142</sup> 87 Ky. 541 (1888).

<sup>143</sup> 39 Ind. 475 (1872); 21 Conn. 19 (1851).

<sup>144</sup> 67 Fed. Rep. 460 (1895).

<sup>145</sup> 13 La. Ann. 246 (1858).

<sup>146</sup> 20 Me. 125 (1841).

<sup>147</sup> 1 Story (U. S.) 57 (1839).

the foundation of the policy, as the minds of the parties have never met.<sup>148</sup> In a life-insurance policy every fact is material which increases the risk, or which if disclosed will be a fair reason for demanding a higher premium, and it is not material if the death be produced by a cause not connected with the subject of misrepresentation.<sup>149</sup>

The tendency of the courts in regard to misrepresentation is the same as to other features of life-insurance contracts, that is, to construe the policy as strongly against the insurer as is reasonable. On an application for life insurance, the insured stated, in answer to a question, that he had three brothers when he had four; this was held not such an untrue representation as would prevent the beneficiary from recovering.<sup>150</sup> As to what a person may have died of; may be largely, if not altogether, a matter of opinion, about which attending physicians often disagree, and as to such matters their statements can only be treated as representations, and not as warranties, and if made in good faith and on the best information had or obtainable, they will not vitiate a policy, if incorrect and unwilfully untrue.<sup>151</sup>

#### CONCEALMENTS

**42. Concealment** is the intentional withholding of any fact material to the risk, which the insured, in honesty and good faith, ought to communicate to the insurer. That is a material fact, the knowledge or ignorance of which naturally influences the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of the premium.<sup>152</sup> A *fraudulent concealment* is the suppression of something which a party is bound to disclose. The intention to deceive must clearly appear. The test is whether one party knowingly suffered the other to deal under a delusion.<sup>153</sup>

The strict rule enforced in cases of marine insurance, requiring full disclosure of all material matters, and avoiding

<sup>148</sup> 108 Mass. 56 (1871).

<sup>149</sup> 21 Pa. 466 (1853).

<sup>150</sup> 16 Can. L. J. 29 (1880).

<sup>151</sup> 52 S. W. Rep. 862 (1899).

<sup>152</sup> And. Dict. 220.

<sup>153</sup> 92 U. S. 98 (1875).



the policy, even in cases of suppression through mistake, is not applicable, according to the weight of authority in the United States, to cases of life insurance. An applicant for life insurance, who has fully and truthfully answered all the questions put to him, may rightfully assume that the range of the examination has covered all matters deemed material by the insurer, and is not required to search his memory for circumstances of possible materiality not inquired about. All that is required is that there shall be no suppression in bad faith, with intent to mislead the insurer.

It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions applicable to all men are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy.<sup>154</sup> The insured cannot urge, as an excuse for his omission to disclose all material facts, that they were actually known to the insurers, unless the knowledge of the latter were as full and particular as his own information.<sup>155</sup> The insurer has a right to expect that everything material, known to the party making the application, shall be communicated to him; and it is at the peril of the insured, if that communication be not made. The party effecting insurance is bound to disclose every material fact within his knowledge, whether he believe such fact to be material or not.<sup>156</sup>

43. The words *sober and temperate* are to be taken in their ordinary sense. The language does not imply total abstinence from intoxicating liquors. The moderate, temperate use of intoxicating liquors is consistent with sobriety. But if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of the contract of life insurance.<sup>157</sup> The

<sup>154</sup> 6 Cush. (Mass.) 42 (1850).

<sup>155</sup> 107 U. S. 485 (1882).

<sup>156</sup> 3 Man. & R. (Eng.) 45 (1828); 39 Ind. 475 (1872).

<sup>157</sup> 9 Fed. Rep. 249 (1881).

term *good health* is to be considered in its ordinary sense, and means that the applicant is free from an apparent sensible disease, or symptoms of disease, and that he was unconscious of any derangement of the functions by which health could be tested. Slight, infrequent, transient disturbances, not usually ending in serious consequences, may be consistent with the possession of good health as that term is here employed. *Severe illness* means such as has, or ordinarily does have, a permanent detrimental effect upon the physical system.<sup>158</sup>

A *temporary ailment* cannot be considered a disease, within the meaning of a warranty against disease in a policy of life insurance, unless it be such as to indicate a vice in the constitution, or so serious as to have some bearing upon general health and the continuance of life, or such as, according to common understanding, would be called a disease.<sup>159</sup> It is well settled that the operation of any concealment on a policy of life insurance depends on its materiality to the risk, and such materiality is a question for a jury. Whether mere temporary ailments or affections, such as sore throat, indigestion, and the like, are to be regarded as diseases, within the meaning of the policy, so that a failure to disclose them is a misrepresentation or concealment of a material fact, is a question to be decided by a jury.<sup>160</sup> Where the insured in his application answers "no" to the question, whether either of his parents, brothers, or sisters ever had pulmonary, scrofulous, or other constitutional or hereditary disease, the answer assumes his knowledge of the fact, and will preclude the beneficiary, in an action on the policy, from alleging the want of knowledge on the part of the insured as an excuse for not answering correctly.<sup>161</sup>

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<sup>158</sup> 20 Fed. Rep. 596 (1884).

<sup>159</sup> 70 N. Y. 72 (1877).

<sup>160</sup> 72 Fed. Rep. 413 (1896).

<sup>161</sup> 91 Ill. 159 (1878).

## FORFEITURES AND AVOIDANCES

44. Forfeitures are not favored in the law, and the courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon a forfeiture, though it might be claimed under the express letter of the contract.<sup>162</sup> The insurer may also authorize his agent to waive forfeitures, and the fact that a premium note is part due, when the agreement to extend was made, does not prevent the agreement from operating as a waiver of the forfeiture.<sup>163</sup>

The principle that no one shall be permitted to deny that he intended the natural consequences of his acts when he has induced others to rely upon them, is as applicable to insurance companies as it is to individuals. It is a principle of sound morals as well as of sound law, and its enforcement tends to uphold good faith and fair dealing. If, therefore, the conduct of an insurer in its dealings with the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture, if the premium be not paid on the day it is due, would not be enforced if payment were made within a reasonable period afterward, the insured ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And, if the acts creating such belief were done by the agent and were subsequently approved by the insurer, either expressly or by receiving and retaining the premiums, the same consequences should follow.<sup>164</sup>

Although courts do not favor forfeitures, they cannot avoid

<sup>162</sup> 144 U. S. 449 (1891).

<sup>163</sup> 96 U. S. 234 (1877).

<sup>164</sup> 95 U. S. 326 (1877).

enforcing them when the party by whose default they are incurred cannot show some good and stable ground for the conduct of the other party, on which to have a reasonable excuse for default.<sup>165</sup>

#### ASSIGNMENT OF POLICIES

**45. Legality of Assignment.**—A very pertinent feature of life-insurance law is the question whether life-insurance policies are assignable or not. The authorities on this question are not in unison, but the weight of authority seems to permit the assignment of a life-insurance policy, irrespective of interest, where such assignment is not a cloak for a wagering contract. Thus, it is held that a policy of life insurance, without restrictive words, is assignable by the insured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee. In New York, a policy of life insurance taken out by the insured himself, or by another having an insurable interest in his life, in good faith, and not for the mere purpose of assignment, may be lawfully assigned to one having no insurable interest in the life of the insured; and the assignee, when the assignment is absolute or general, will be entitled to the entire proceeds of the policy. So, in Ohio, Indiana, Massachusetts, and Tennessee, if the assignment be not a mere cover for a wager contract.<sup>166</sup>

The authorities that hold in favor of assignment, give as their reasons for such assignment: (1) That, since a person can designate any one he chooses as beneficiary, he has the same right to assign to any one he pleases, making no distinction between the designation of a beneficiary and an assignment; (2) that as a life-insurance policy is a chose in action, it will be treated as other choses in action, and be governed by the law of property permitting the assignment

<sup>165</sup> 144 U. S. 439 (1891).

<sup>166</sup> 117 U. S. 591 (1885); 98 Md. 416 (1899); 138 Mass. 24 (1884); 94 U. S. 457 (1876); 3 Mo. 38 (1882); 158 N. Y. 24 (1899); 53 S. W. Rep. 181 (1899); 92 Ind. 503 (1883).

of choses in action. The authorities that hold that assignments of life-insurance policies are not legal regard an assignment of a policy taken out by a person on his own life void, unless the assignee have an interest; and, where it is assigned as security for a debt, it is only valid in the hands of the assignee to the extent of the money paid by him, with interest thereon. If the law were otherwise, the courts say, it would be permitting that to be done indirectly which it prohibits from being done directly. The evil of wager policies would rather be aggravated than otherwise by such a rule, because speculators, desiring to indulge in this species of gambling in human life could more easily purchase from embarrassed policy holders than procure the issue of such policies directly to themselves upon the lives of strangers.<sup>167</sup> In Pennsylvania, Kentucky, Kansas, and some other states, it has been held that the assignee must have an interest to enable him to hold the proceeds of the policy.<sup>168</sup> In England, the rule seems to be in favor of the validity of assignments. If, however, the policy expressly state that it cannot be assigned, such a provision is binding upon all parties;<sup>169</sup> and where there is no provision against assignment, the assent of the insurer is not required in making an assignment.<sup>170</sup> Where a person insures his life and designates certain persons as beneficiaries, the insured has no interest in the policy, and cannot make an assignment thereof.<sup>171</sup>

**46. Method of Assignment.**—Although a policy is usually assigned in writing, a verbal assignment will vest the equitable title in the assignee.<sup>172</sup> To constitute a valid assignment there should be a delivery of the policy to the assignee.<sup>173</sup> A policy of insurance being a chose in action, the method of assigning choses in action applies to life-insurance policies. Courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the

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<sup>167</sup> 76 Ala. 183 (1884).

<sup>168</sup> 110 Pa. 109 (1885); 81 Ky. 368 (1883);

36 Kans. 146 (1887).

<sup>169</sup> 118 Mass. 219 (1875).

<sup>170</sup> 152 Mass. 343 (1890).

<sup>171</sup> 79 Ky. 83 (1880).

<sup>172</sup> 77 Mo. 38 (1882).

<sup>173</sup> 50 Wis. 603 (1880).



name of the assignor, and recover a judgment for his own benefit. But, in order to constitute such an assignment, two things must concur: (1) The party holding the chose in action must, by some significant act, express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee, or to some person for his use, the security, if there be one, bond, deed, note, or written agreement, upon which the debt or chose in action arises; (2) the transfer shall be of the whole and entire debt or obligation, in which the chose in action consists, and so far as practicable place the assignee in the condition of the assignor so as to enable the assignee to recover the full debt due, and to give a good and valid discharge to the party liable.<sup>174</sup> Where in a policy of insurance is incorporated the proviso that the policy is not assignable except for the benefit of the insured's wife and children, if it be assigned to some one else, even with the consent of the company, such assignment will be void; but, if the assignee pay any premiums upon the policy, they may be recovered from the beneficiary. If, in a case like this, the insurer should pay to the assignee, the assignee would hold it in trust for the beneficiary.<sup>175</sup>

#### 47. Assignment by Insolvent for Benefit of Wife.

The assignment of policies of life insurance by a debtor who was insolvent when insured, in trust for the benefit of his wife, is fraudulent and void against creditors. But assignment of policies of insurance effected without fraud, directly and on their face for the benefit of the wife and payable to her, are not held fraudulent as to creditors.<sup>176</sup>

**48. Assignment to Creditors.** — In case of assignment to creditors generally, the creditor can recover the whole amount of insurance, but can only retain the amount of his debt, and the remainder goes to the representatives of the insured; this ruling, however, is not a universal one, some jurisdictions holding that the creditor is entitled to the whole

<sup>174</sup> 6 Cush. (Mass.) 282 (1850).

<sup>175</sup> 118 Mass. 219 (1875).

<sup>176</sup> 50 Pa. 75 (1865)

fund.<sup>177</sup> The rule in Kentucky is that one having no insurable interest either as of kin or as creditor, can derive no benefit from life insurance by an assignment of the policy.<sup>178</sup> In Indiana, a joint assignment by a husband and wife of a policy on the husband's life to secure a debt owing by him will not affect the wife's interest in the policy, for the assignment by the husband cannot pass her interest, and, under the statute prohibiting the wife from becoming surety, her own assignment is void.<sup>179</sup> In Pennsylvania, a wife may assign a policy upon her own life to her husband who may in turn assign it to his creditor in payment of a debt.<sup>180</sup>

**49. Assignment for the Benefit of Creditors.** Where a person makes a general assignment of all of his property for the benefit of creditors, it will include a policy of life insurance.<sup>181</sup>

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<sup>177</sup> 110 Pa. 109 (1885).

<sup>178</sup> 51 S. W. Rep. 312 (1899).

<sup>179</sup> 11 Ind. App. 335 (1894).

<sup>180</sup> 182 Pa. 237 (1899).

<sup>181</sup> See *The Law of Debtor and Creditor: Assignment for the Benefit of Creditors*.

# THE LAW OF INSURANCE

(PART 3)

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## FIRE INSURANCE

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### DEFINITION AND NATURE

1. **Fire insurance** is a contract of indemnity against loss or damage by fire, suffered by an owner or person having an interest in the property insured;<sup>1</sup> in other words, one wherein the subject is property and the risk insured against is fire.<sup>2</sup> All that is requisite to constitute such a contract is the payment of the consideration by the insured, and the promise by the insurer to pay the amount of the insurance upon the happening of injury to the subject by a contingency contemplated in the contract. As in other insurance, the contract of fire insurance is evidenced by the policy, by which, when issued and accepted, the parties become bound as to all its terms and conditions.<sup>3</sup> There may be inserted in the policy whatever conditions the parties please, provided there be nothing in them contrary to statutory law or public policy.<sup>4</sup>

2. **Distinction Between Open and Valued Policies.** The principles which apply to fire insurance are, in general, those that govern other kinds of property insurance, some of which have already been stated. Those that are specially applicable to indemnity from the peril of fire are here considered. First, in point of importance, are the rules that apply to the policies issued by the insurer, which, as has been

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<sup>1</sup> 86 Me. 518 (1894).

<sup>2</sup> 66 Wis. 50 (1886).

<sup>3</sup> 19 How. (U. S.) 318, 321 (1856).

<sup>4</sup> 3 Hill (N. Y.) 161 (1842).

mentioned, are of two kinds—*open* and *valued*.<sup>5</sup> The open policy is the more common, being the older. By it the amount of liability is left to be determined according to the actual loss, either by agreement of the parties or upon proof in compliance with its terms, or with the rules of evidence.\* Where the value is placed on the property insured and inserted in the policy in the nature of liquidated damages, the policy is a valued one. These definitions are repeated here simply as preliminary to more effectively pointing out the distinction. Many cases have required close judicial inspection in discovering whether a policy were one or other of the two kinds. In the case from which definitions of the kinds of fire-insurance policies are drawn, the sole question was whether the policy were an open or valued one, and it was held that a policy must be regarded as an open one, unless it appear to have been the intention of the parties to it, upon a fair and reasonable construction of its terms, to value the loss and thereby fix, by contract, the amount of recovery. If there be anything in the policy that clearly indicates an intention on the part of the insurer to value the risk and the loss, in whatever words expressed, the policy is valued; otherwise, it is open.<sup>7</sup> To be a valued policy, however, the instrument must insure specific property, unless it be otherwise clearly expressed, and the words "valued at," or an equivalent term, must be used.<sup>8</sup> The policy must not merely estimate the value, but must appraise the loss and be equivalent to an assessment of damages.<sup>9</sup>

Where a policy was issued for an amount "being not more than three-fourths of the value of the property," but contained the further provision that the company should in no event be liable beyond the sum insured, nor beyond three-fourths of the actual cash value at the time of the loss, it was held not to be a valued policy. It was an express contract limiting the liability, but it was held that without this latter clause it

<sup>5</sup> See *subtle* Form of Contract *supra*.

<sup>6</sup> 38 Ohio St. 123 (1882); 101 N. Y. 458 (1886).

<sup>7</sup> 38 Ohio St. 134 (1882); Wood Fire Ins., Sec. 41.

<sup>8</sup> 4 La. 289 (1832).

<sup>9</sup> 48 Pa. 367 (1864).

would be a valued policy, and the valuation conclusive upon the parties.<sup>10</sup> Under a valued policy, in the absence of fraud, the actual value of the property or of the interest of the insured is immaterial, and the insurers are bound to pay the amount fixed in the policy, though the loss may be much less; and this provision of the policy is conclusive on both parties thereto; other provisions as to the amount of liability in no way affect the measure of recovery.<sup>11</sup> In many of the United States, valued-policy laws have been enacted which provide in substance that the amount written in the policy shall be conclusive evidence of the value of the insured in case of total loss; but it has been held that such policies apply only to real property, and have no effect on insurance on personalty.<sup>12</sup>

**3. The Standard Policy.**—In some of the United States, and in Canada, a form of standard fire-insurance policy is prescribed by statute.<sup>13</sup> The object of the enactment of the statutes is avowed to be to unify and harmonize the provisions of such contracts and to remove the ambiguity attaching to prior forms. As a sample of these enactments, the Pennsylvania statute is quoted.<sup>14</sup> Its title is "An act to provide for a uniform contract or policy of fire insurance to be made and issued by all insurance companies taking fire risks on property within the state," and the act provides that the insurance commissioner shall prepare and file in his office, on or before November 15, 1891, a printed form, in blank, of a contract or policy of fire insurance, together with such provisions, agreements, or conditions as may be indorsed therein or added thereto and form a part of such contract or policy, the designation of such form being "Standard fire-insurance policy of Pennsylvania," a certified copy of which form the commissioner is required to forward to each fire-insurance company transacting business in the state. Contained in the form, it is provided, shall be

<sup>10</sup> 105 Mass. 396 (1870).

<sup>11</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 13, p. 103, and the cases there cited.

<sup>12</sup> *Ibid.*, p. 104, citing 83 Iowa 12 (1891); 53 Mo. App. 625 (1893); 64 Tex. 578 (1888).

<sup>13</sup> Stats. of Conn., Maine, Mass., Mich., Minn., N. H., N. J., N. Y., N. Dak., Pa., Wis., Wyo., and Ont. Ins. Act, 1897, Sec. 188.

<sup>14</sup> Pa. P. L. 1891, p. 22, Secs. 1-4.



the name of the company, its location and place of business, the date of its incorporation or organization, whether it be a stock or mutual company, the names of officers, the number and date of policy, and, if it be issued through a manager or agent, there shall be printed thereon the words: "This policy shall not be valid until countersigned by the duly authorized manager or agent at \_\_\_\_\_." It is further provided that printed or written forms of descriptions, specifications, schedules, and the like, may be attached to the policy. It is made the duty of the insurance commissioner to prepare and file a standard form of policy to be used for perpetual insurance, to which the conditions of the act, as to the standard form previously stated, apply, which are for the use of companies authorized by law to issue perpetual policies. The foregoing comprises the main provisions of the statute, but it also includes provision for printing in the form, under the separate title, "Provision required by law to be stated in the policy," any provision required by law to be inserted therein; and there is also provided a penalty for violating any of the provisions of the statute.

In two of the states which have standard policy statutes—Minnesota and Pennsylvania—the courts have declared them unconstitutional, because, under the provisions of the statutes in these particular states, the legislature attempted to delegate its own proper functions to the insurance commissioner in framing the law and putting it into force.<sup>15</sup> In Massachusetts, the form of standard policy provided by the statute must be plainly printed in type no smaller than long primer. In almost every state where no standard policy is prescribed by statute, including those where the courts have declared the standard policy acts unconstitutional, the standard policy has been adopted by the voluntary action of the insurance companies.

4. The benefit of the legislation which produced the standard policy is incalculable to both insurer and insured. Prior to the legislation, each company prescribed the form of its

<sup>15</sup> 59 Minn. 182, 191 (1894); 166 Pa. 78 (1895).

contract, and there were almost as many different contracts of insurance as there were companies. The variations and differences between the conditions of the policies issued by the various insurance companies were almost infinite in number. Parties taking insurance were often misled by unusual clauses or obscure phrases concealed in a mass of verbiage and often so printed as almost to elude discovery. Unconscionable defenses based upon such conditions were not infrequent, and courts seem sometimes to have been embarrassed in the attempt to reconcile the claims of justice with the law of contracts. To meet and remedy such conditions was the avowed object of the legislation, as we have stated.<sup>16</sup>

There are two classes of standard policies. In the one class, those in vogue in Michigan, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, and Wisconsin, all provisions appear in the printed form, no conditions can be waived, and only certain consistent conditions can be added. The other class are those in vogue in Massachusetts and New Hampshire, which contain merely a few special provisions; others are to be supplied by agreement of the parties. The provisions of the standard policies differ to some extent, but nearly all, if not all, provide against liability of the insurer for loss by fire caused by invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever. Usurped power, in such case, is held to mean usurpation of the power of government and not mere excess of jurisdiction by a lawful magistrate. Thus, if a mayor of a city cause property to be destroyed to prevent the spreading of a conflagration, such act is not within the provision and the company will be liable.<sup>17</sup> A riot, within the meaning of the terms of the standard policy, is held to be such where a breaker at a coal mine is set on fire at night by a party of men, who fire a number of shots, drive the watchman away, and then burn the breaker. The insurance company in such case is not liable, because the loss is caused by riot.<sup>18</sup>

<sup>16</sup> 85 Wis. 606 (1893); 133 N. Y. 356, 365 (1892).

<sup>17</sup> 21 Wend. (N. Y.) 367 (1839).

<sup>18</sup> 95 Pa. 89 (1880).

## CONDITIONS IN POLICIES

**5. Legal Effect of Policy.**—The law of the relation between insurers and the insured is the policy of insurance, with all its clauses, conditions, and stipulations by which the mutual rights and liabilities of the parties are defined and measured. As stated before, the parties may insert in the policy any conditions they please, provided there be nothing in them contrary to the law or public policy.<sup>19</sup> Although a policy by its terms provides that it shall be void on a breach of any of its conditions, its legal effect is simply to render it voidable at the election of the insurer, and the insurer can waive the forfeiture and continue the policy in force.<sup>20</sup> When an insurance company attempts to defeat a recovery upon a policy upon a condition which was intended solely for its own benefit, and which deprives the insured, however honest his claim may be, of the indemnity which he has paid for, the company will be held to entire good faith. The breach of the condition must be promptly taken advantage of. Nothing else must be alleged as a reason for non-payment, and the insured must not be led astray by proposing settlement on grounds other than the alleged breach of condition. Thus, a condition of a policy of fire insurance providing that no suit thereon shall be sustained unless brought within six months after the loss shall accrue may be waived, not only by express words, but by acts and conduct of the company and its officers, which threw the insured off his guard and lulled him into security.<sup>21</sup>

**6. Increase or Change of Risk.**—One of the conditions contained in almost every policy is to the effect that it shall become void in case of any increase in the risk. This condition is not strictly construed against the insured, but it is presumed to be made with reference to the character of the property insured and the owner's use of it in the ordinary way and for the purposes for which

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<sup>19</sup> 40 Pa. 289 (1861); 3 Hill (N. Y.) 161 (1842).

<sup>20</sup> 16 Fed. Rep. 454, 457 (1883).

<sup>21</sup> 129 Pa. 558, 562 (1889).

such property is ordinarily held and used. It has been held that it must be an essential increase of the risk, not a mere trifling one.<sup>22</sup> Such a condition applies only to the insured premises, or to property under the control of the insured. Thus, an increase in risk, resulting from adjacent premises over which the insured has no control, will not avoid the policy though it declare that if the "hazard is increased without the consent of the company in writing," the policy shall be void.<sup>23</sup>

**7. Storing Prohibited Articles.**—In the ordinary policy, there is a condition prohibiting the storing or keeping of certain hazardous articles, such as benzine, burning fluid, camphene, fireworks, gasoline, gunpowder, hay, kerosene, naphtha, petroleum, saltpeter, spirituous liquors, and turpentine, without written permission indorsed on the policy. This is construed to mean a storing or keeping, in a mercantile sense, in considerable quantities, with a view to commercial traffic, or when storing or keeping is the sole or principal object of the deposit, not where the keeping is incidental, and only for the purpose of consumption.<sup>24</sup> Thus, the keeping of such an article in small quantities, for use as medicine, is not within the prohibitions of such a policy, and does not avoid it; as where one keeps a small jug of crude petroleum in his room for occasional use in anointing his person. Also, oil and turpentine brought into a house for the purpose of painting it are not stored therein within the meaning of a clause in the policy prohibiting the storing of such articles. And it has been held that the keeping of such articles in reasonable quantities for the purpose of selling at retail is not a keeping or storing within the meaning of the policy.<sup>25</sup> Although the policy generally prohibits the keeping or use of certain articles upon the insured premises, and it is held that a keeping in violation thereof will render it null and void, where the insurance is upon the materials used in a business,

<sup>22</sup> 25 Minn. 229 (1878); 3 Fed. Rep. 558 (1880).

<sup>24</sup> 61 N. Y. 26 (1874); 6 Wend. (N. Y.) 623, 627 (1831).

<sup>23</sup> 108 N. C. 196 (1890).

<sup>25</sup> 15 S. W. Rep. 945 (1891).

it includes and authorizes the use of all such materials as are in ordinary use in the business.<sup>26</sup>

**8. Alterations and Repairs.**—In the absence of any stipulations or restrictions in the policy, the insured has the right to make any alterations or repairs that do not increase the risk of the insurer.<sup>27</sup> In most policies, however, there are conditions which greatly limit and restrict the right of the insured in making alterations and repairs, and such conditions are held not to be unreasonable. Thus, a policy, containing a provision that it shall become void if, without notice to the company and its permission, “mechanics are employed in building, altering, or repairing the premises,” becomes void by the employment of mechanics in such building, altering, or repairing them; and the insurer is not responsible to the insured for damage and injury to the insured premises thereafter by fire, although not happening in consequence of the alterations and repairs.<sup>28</sup>

**9. Vacant and Unoccupied Premises.**—Where a policy is conditioned to be void if the premises become vacant or unoccupied, the existence of either condition will render it so. The insurer has a right to contract for and rely upon the protection, care, and supervision which the occupancy of a place affords. The reason given for the insertion of such a condition is that an unoccupied building invites a shelter to wanderers and evil-disposed persons; no one is present to care for the property or seasonably to extinguish the flames in case of fire. It is more exposed to destruction, and affords a great opportunity to a dishonest owner to turn it, if unprofitable, into money when insured by becoming a party to its destruction by fire.<sup>29</sup> Such a condition is to be construed in view of the situation and character of the property insured, and the ordinary incidents and contingencies affecting the use to which it and other property of like character similarly situated is subject.<sup>30</sup>

<sup>26</sup> 58 N. Y. 292 (1874); 43 Pa. 350 (1862).

<sup>27</sup> 158 Mass. 475, 479 (1893); 4 Mass. 330 (1808).

<sup>28</sup> 151 U. S. 452 (1893).

<sup>29</sup> 66 N. W. Rep. 801 (1896).

<sup>30</sup> 72 N. Y. 117 (1878).



Occupation of a house is living in it, not mere supervision over it; and, while a person need not live in it every moment, there must not be a cessation of occupancy for any considerable portion of time.<sup>31</sup> For what length of time it may remain unoccupied will depend upon the circumstances of each case, such question being determined in view of the consideration that led to the incorporation of the provision into the policy, and the necessity that not infrequently arises for persons insured to leave temporarily their dwelling houses. Thus, a policy of insurance upon a dwelling house was conditioned to be void if the house should become vacant or unoccupied. The tenant moved out on March 26, and the intended new tenant made certain repairs on the premises intending to move into the house on the 1st of April. On March 30, the day the repairs were completed, the prospective tenant put some hay into the loft of a stable on the premises and buried some potatoes on a lot near the house. The dwelling was destroyed by fire on March 31. It was unoccupied when burned, and the only articles in it were some planes left after the completion of the repairs. It was held that the house was vacant within the meaning of the condition of the policy, and the policy was void.<sup>32</sup> In another case, the tenant occupying the insured building moved out and, on the day after he left, the owner went to the house, stayed there all day, and then left and began packing up preparatory to moving into the house herself. She also placed a man in charge of the house. The fire occurred the next day before she moved in. It was held that the house was not vacated.<sup>33</sup>

**10.** A mere temporary absence is not a breach of the condition. One is not to become a prisoner on the property, nor be charged with laches when, in the pursuit of his business, health, or pleasure, he temporarily leaves the property. The necessity of most persons for temporary absences on business or family convenience is known to every one, and

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<sup>31</sup> 76 Mich. 653 (1889); 124 Ind. 132, 140 (1890).

<sup>32</sup> 124 Ind. 132 (1890).

<sup>33</sup> 21 Atl. Rep. 505 (1891).

is held to be in the contemplation of the insurer when the policy is issued. Thus, absence of the insured from his dwelling from Wednesday until Monday to attend a funeral was held not to be a breach of the condition.<sup>34</sup> Where notice is required to be given to the insurer, within a certain number of days, of a vacating, it must be so given or the policy will become void.<sup>35</sup> Thus, a policy upon a dwelling house contained a provision that if the house should be "left unoccupied without giving immediate notice to the company, the policy shall cease and be of no force or effect," it was held that the absence of the one who resided in the house without notice to the company, for six weeks, although he frequently returned and looked after the house and the property therein, would avoid the policy.<sup>36</sup>

**11. Ownership and Change of Title.**—Where a policy contains the provision that if the insured is not the sole, entire, and unconditional owner, the policy shall be void, and the insured accepts the policy with this provision—if this were not substantially true—the policy is void.<sup>37</sup> It has been held that a mortgage upon insured premises is not a sale, alienation, conveyance, transfer, or change of title, within the meaning of a clause in a policy which prohibits a transfer or change of title without the consent of the insurer.<sup>38</sup>

**12. Warranties.**—Any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. If a house be insured against fire, and be described in the policy as being "copper roofed," it is as express a warranty as if the language had been "warranted to be copper roofed," and its truth is as essential to the obligation of the policy in one case as in the other. There may often be difficulty in ascertaining, from the construction of the policy, whether a fact, quality, or circumstance specified relate to the risk, or be inserted for some other purpose, as to show the identity of

<sup>34</sup> 45 N. W. Rep. 171 (1890); 95 Pa. 492 (1880).

<sup>35</sup> 120 N. Y. 70 (1890).

<sup>36</sup> 5 Thomp. & C. (N. Y.) 619 (1875).

<sup>37</sup> 27 Mo. App. 26 (1887).

<sup>38</sup> 55 Ill. 213 (1870).

the article insured. But, when it is once ascertained that it relates to the risk and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void. The word *warranty* dispels all ambiguity, and supersedes the necessity of construction. If a house be insured against fire, and the language of the policy read "warranted, during the policy to be covered with thatch," the insurer will be discharged, if, during the insurance, the house should be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties. It is immaterial for what purpose, or with what view, it is made, and unless the insured can show that it has been fulfilled, he can derive no benefit from the policy. It is also immaterial to what cause the non-compliance is attributable; for, if it be not in fact complied with, though, perhaps, for the best of reasons, the policy is void.<sup>39</sup>

**13. Condition as to Other Insurance.**—It is a reasonable condition to provide against other insurance without the consent of the insurer, and the violation of it is in disregard of the terms of the policy, such as the insurer has a right to urge as a defense to an action on the policy. Over-insurance is a temptation to crime, and insurance companies have a right to protect themselves by such provisions. Insurance companies rely more upon the interest than the morals of the insured for protection against carelessness of owners in the preservation of the insured property, and, therefore, always leave a sufficient amount uncovered by the policy to make it the interest of the insured to take proper care of it. To enable them to do this, it is necessary that they should be informed of any existing or after increase of insurance, that they may assent to it or reject it.<sup>40</sup>

Where one of the conditions of a policy declared that it should be void if any other insurance on the property existed at the time, or should be effected thereafter, without the consent of the insurance company, it was held that the

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<sup>39</sup> 13 Conn. 533, 544 (1840).

<sup>40</sup> 27 Mo. App. 26, 34, 35 (1887).

existence of another policy at the time avoided it, though it were unknown to the insured. The fact that the other policy or policies may be void will not prevent the forfeiture.<sup>41</sup> A condition that, if there be other insurance upon the property without the assent of the company indorsed on the policy it shall be void, is not waived by giving notice of an intention to effect other insurance.<sup>42</sup>

**14. Loss Made Payable to Third Party.**—It is a frequent thing in insurance business for a person to insure his property, and either in the policy itself or by indorsement at the time it is made, or by subsequent indorsement—to which the consent of the company is generally required—to direct the loss to be paid to some third party as his interest may appear. It is a mode of appointing that the loss of the party insured shall be paid by the company to such third person.<sup>43</sup> The contract remains, however, as a contract of indemnity to the original insured; he must have an insurable interest in the property, and the property must be his at the time of the loss. Although, under such a direction, the contract with the insured is not thereby merged or extinguished, if assented to by the insurer, the person in whose favor the appointment is made acquires equitable rights, which the insurer is bound to regard. But he has no greater rights under the policy than the insured and takes subject to all the equities which the insurer may have against the one insured.<sup>44</sup> Thus, where a policy names the owner as the person insured, and declares that the damages in case of loss shall be payable to another person, therein named as mortgagee, the latter cannot recover in case of a breach of the conditions of the policy by the mortgagor. In such case, the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee.<sup>45</sup>

<sup>41</sup> 86 Ala. 551 (1888).

<sup>42</sup> 98 N. C. 143 (1887).

<sup>43</sup> 10 Wall. (U. S.) 33-37 (1869).

<sup>44</sup> 64 Mass. 337, 346 (1852); 38 N. J. Law 140, 143 (1875).

<sup>45</sup> 3 Cliff. (U. S.) 213 (1868).

**15. Policy for Benefit of Another.** — One may insure, in his own name, the property of another for the benefit of the owner without his previous authority or sanction, and it will inure to the party intended to be protected upon his subsequent adoption of it even after a loss has occurred, but it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made, although such intention need not have fastened, at the time of entering into the contract, upon the very person who, when the contract matures, seeks to take the benefit of it.<sup>46</sup> If the law were otherwise, policies to commission merchants, warehousemen, and factors, insuring goods "as held in trust" or "on commission," would be of little avail. For it cannot be seen who will, in the course of the term of the policy, come into such relations with them.

**16. Policy for "Whom It May Concern."** — The words "whom it may concern" in a policy of insurance, are technical, and are understood to mean not any and everybody who may chance to have an interest in the thing insured, but such person only as is in the contemplation of the contract. Such a policy supposes an agency, and proceeding upon that ground, looks only to the principal on whose behalf, or on whose account, the agent moves in the transaction.<sup>47</sup>

No one can avail himself of a policy of insurance not containing the general clause "whom it may concern," or one of similar import, but those named in the policy as the parties insured or on whose account it is expressed to be made. But a policy in the name of one with this general clause will cover the interest of any person for whose benefit it is intended when effected, and who either previously authorizes it or subsequently adopts it; subsequent adoption in such a case being equivalent to a prior order for the insurance. This is the result, though those so intended are not known to the broker who procures the policy, or the insurance company bound by it.<sup>48</sup>

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<sup>46</sup> 9 Pa. 198, 200 (1848); 45 N. Y. 606, 612 (1871).

<sup>47</sup> 16 Am. Dec. 317 (1826).

<sup>48</sup> 98 U. S. 528, 536 (1878).



## ADJUSTMENT OF LOSS

**17. Duty of Insured to Save Property.**—In the standard policy, in use at the present time, there is inserted a clause to this effect: "If the insured property shall be exposed to loss or damage by fire, the insured shall make all reasonable exertions to save and protect the same"; or one declaring that the company shall not be liable for loss caused directly or indirectly by neglect of the insured to save and preserve the property at and before the fire, or when the property is endangered by fire in neighboring premises. The result of such a requirement is that if one stand by and see his property consumed by fire without putting forth any effort to save it, and it transpire that, by doing certain necessary acts to prevent destruction, he could have lightened the insurer's burden of loss, he may be made to bear any unnecessary loss that results from his negligence.<sup>49</sup> However, before the insurer will be relieved by reason of the neglect of the insured to put forth a helping hand to save his own property, it must appear that it was in the power of the insured to accomplish something by his endeavors.<sup>50</sup>

**18. Notice and Proof of Loss.**—In case of loss or damage, it is the duty of the insured to give notice thereof to the insurer in writing and to follow it up by rendering a statement forthwith in writing, signed by and sworn to by the insured, in which there shall be contained in detail, the value of the insured property, the interest of the insured therein, all other insurance thereon, the purposes for which, and the persons by whom, the insured property was used, and the time at which and the manner in which the fire originated, so far as known to the insured. The whole object of notice is that the company may know that a loss has in fact occurred, so that it may take such action as it considers proper to protect its interests.<sup>51</sup> If furnished forthwith or within the time required for the furnishing of notice,

<sup>49</sup> 89 N. Y. 186 (1882).<sup>50</sup> 79 N. C. 285 (1878).<sup>51</sup> 41 Mich. 131, 136 (1879).

proof of loss may also operate as notice, but notice cannot supply the place of proof, nor dispense with the necessity for producing it.<sup>52</sup> The time in which notice must be given and proofs of loss furnished is generally specifically set forth in the policy, some of the forms of the standard policy requiring the statement of proof of loss rendered "forthwith." Where no time is specified, a reasonable time will be allowed. What is a reasonable time depends upon the circumstances and surroundings of each particular case.<sup>53</sup> In Pennsylvania, the legislature has practically given a definition of reasonable time by fixing the period of ten days for notice of the fire and twenty for the proof of loss.<sup>54</sup> When the policy provides that in case of fire immediate notice thereof shall be given to the company, the courts have held that notice given within a reasonable time is a compliance therewith. Where it provides that in case of loss the insured shall forward or render notice or proof of loss within a certain time, the mailing of the necessary proofs within the time required is a sufficient compliance with the terms of the policy, although they be not delivered at the office of the insurance company until after the expiration of the time allowed.<sup>55</sup>

**19. Manner of Giving Notice and Proof.**—Notice and proofs of loss must be furnished by the insurer or his agents to the authorized agent of the insurance company. This agent is called the adjuster, and he has no implied power to delegate his authority to another.<sup>56</sup> They should be forwarded to the general office of the company, but it will suffice if the company receive them, no matter where. The authority of a local agent to receive proposals for insurance and countersign and deliver policies does not extend to adjusting losses or waiving the stipulated notices and proofs of loss, and binding the company to pay without them. And the mere fact that such an agent assumed in a particular case to do those acts is insufficient to establish his

<sup>52</sup> 86 Ala. 558 (1888).

<sup>53</sup> 24 Mo. App. 145 (1887).

<sup>54</sup> 151 Pa. 607, 616 (1892).]

<sup>55</sup> 68 Ill. App. 268 (1896); 198 Ill. 286 (1897).

<sup>56</sup> 59 N. J. Law 18 (1896).

authority.<sup>57</sup> In Pennsylvania, however, it is provided by statute that notice and proofs may be delivered to the company at its general office or to the agent who countersigned the policy.<sup>58</sup> However, where the policy provides for the production of preliminary evidence of loss, as a condition precedent to the payment of such loss by the insurer, it is well settled that a substantial compliance with such condition must be made by the claimant before a right of action will accrue to him for losses, unless the right to insist on such preliminary condition be waived. Such conditions have been liberally expounded and held to require only the best evidence of the fact which the party possesses at the time. The claimant is not bound to comply with these requirements with technical strictness, either as to the time or manner of compliance.<sup>59</sup> If the knowledge be fully communicated, courts are not very particular as to the form in which it is done.<sup>60</sup> The sufficiency of preliminary proofs, there being no question of waiver involved, is a question of law for the court, and not a question of fact for the jury.<sup>61</sup>

**20. What the Statement Should Contain.**—The condition in insurance policies requiring that a “particular account of the loss be rendered,” depends upon the facts and circumstances of each particular case. If it be reasonably specific, it is enough.<sup>62</sup> The reasonable construction of this condition is that the insured shall produce to the company something which will enable them to form a judgment whether the loss or damage claimed for were actually sustained.<sup>63</sup> The statement or account of articles lost should give accurately, if possible, or approximately, the kind and value of the articles lost, and should also be at least an effort to enumerate them. It should be in its aim of such a circumstantial character as to afford detailed, itemized information of the extent of the loss. Thus, a policy

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<sup>57</sup> 121 Mass. 439 (1877); 63 N. Y. 531, 535 (1876).

<sup>58</sup> Pa. P. L., 1883, p. 165; 151 Pa. 607, 616 (1892).

<sup>59</sup> 3 Bush (Ky.) 328, 333 (1867).

<sup>60</sup> 10 N. J. Law 110 (1832).

<sup>61</sup> 10 Fed. Rep. 347 (1881).

<sup>62</sup> 24 Mo. App. 145 (1887).

<sup>63</sup> 25 U. C. Q. B. 431 (1866).

requiring the insured to furnish as particular an account as the nature of the case will admit of will not be complied with by a statement in which there is not even an attempt to enumerate the articles lost, or to give their kind or value, and a reference to the books and invoices of the insured, even when they are in possession of the insurer after the loss, will not be sufficient, as it is the duty of the insured to make out the particular statement.<sup>64</sup>

A failure to state the value of the several kinds of the property destroyed is not ground for objection when not objected to at the time the proofs were furnished.<sup>65</sup> A statement of the aggregate value of property destroyed is sufficient unless objected to; but, if objected to and it appear that the insurer had means of furnishing a more specific account but failed so to do, it will not be sufficient. Where a plaintiff suing upon a policy of insurance which required a particular account of the loss, had given only a statement that the property insured (merchandise in his store) was totally consumed, as were also his books of accounts, invoices, and papers relating to the business, and that the value, as nearly as could be ascertained without such books was three thousand dollars, the statement being verified by affidavit, and the evidence showing that he had means of furnishing a more particular account through those from whom he purchased, it was held to be no compliance with the condition.<sup>66</sup>

**21. Production of Invoices and Books.**—Where a policy requires the insured to produce his invoices and books for examination in case of loss, under penalty of forfeiture, he must comply with such requirement or show a legal excuse for his non-compliance, or he cannot recover. Where the insured has knowingly assented to the conditions of his policy requiring him to keep books of account, and to produce them for examination in case of loss, the fact that he kept no books will not excuse his failure to comply with the condition.<sup>67</sup>

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<sup>64</sup> 17 Fed. Rep. 347, 353 (1881).

<sup>65</sup> 70 Iowa 704 (1886).

<sup>66</sup> 25 U. C. Q. B. 431 (1866).

<sup>67</sup> 169 Ill. 626 (1897).

**22. Magistrate's Certificate of Loss.**—A stipulation in a policy providing that in case of loss the insured shall produce a certificate under the hand and seal of a magistrate or notary public living nearest the place of fire, stating that he knows the character and circumstances of the insured, has inquired into the facts, and believes that the insured has, without fraud, sustained loss on the property insured to the amount stated in the certificate, is valid and binding upon the insured.<sup>68</sup> In Kentucky, however, it is held that such requirement need not be observed. And, in Indiana, it is provided by statute that a foreign insurance company cannot require a certificate of loss to be certified by the nearest magistrate.<sup>69</sup> In New Jersey, it is held that such certificate is no part of the proof of loss, and need not be furnished with or annexed thereto.<sup>70</sup>

**23. Fraud or False Swearing.**—Clauses providing that the insured in case of loss shall submit to an examination under oath, and that fraud or false swearing shall avoid the policy, are valid and enforceable; the motive for so doing makes no difference. Thus, a policy contained a clause to the effect that in case of loss the insured should submit to an examination under oath by the agent of the insurer, and that fraud or false swearing should forfeit the policy. The insured, after loss, submitted to such examination, and made false answers under oath respecting the purchase and payment of the goods insured. Although it appeared that the statements were not made for the purpose of deceiving the insurer, but for the purpose of covering up false statements previously made to other parties, it was held that the motive which prompted the insured was immaterial, since the questions relating to the ownership and value of the goods were material, and that the attempted fraud was a breach of the condition of the policy and a bar to recovery.<sup>71</sup> The false statements must be knowingly and intentionally made. Where one upon

<sup>68</sup> 141 Pa. 10 (1891); 50 Conn. 551 (1883).

<sup>69</sup> 100 Ky. 29 (1896); 46 Ind. 315 (1874).

<sup>70</sup> 56 N. J. Law 679 (1894).

<sup>71</sup> 110 U. S. 81 (1883).



such an examination included a sewing machine which he believed, and had all reason to believe, had been destroyed, but which in fact had not been, it was held that such a fact would not work a forfeiture of the policy.<sup>72</sup>

#### **24. Insurer's Waiver of Right to Notice and Proof.**

The insurance company may expressly or impliedly waive its right to insist upon the production of, or defects in, the notice and proofs of loss. The doctrine upon which waivers of this clause have been implied is that of good faith; that neither by silence, nor by putting the refusal to pay upon other grounds which seemingly admit or dispense with preliminary proofs, shall the insurer mislead the insured into a belief that his proofs are proper and thereby lull him into seeming security, and afterwards be allowed to absolve himself from liability by showing defects in those proofs.<sup>73</sup> The waiver of proofs of loss is a waiver of notice and all other precedent requirements, but a waiver of notice of the loss does not include a waiver of the particular statement or proofs required to be furnished.<sup>74</sup>

The waiver must in fact either expressly, or by implication, be made. Thus, the insurer who rejects as defective preliminary proofs without specifying the defects, but refers the insured to the condition of the policy which defines what they must contain, with a notice that he insists upon an exact compliance with that condition, waives no right to urge the defects in such proofs.<sup>75</sup> A verbal waiver of such condition by an agent of the company will not prevent a forfeiture where the policy plainly provides upon its face that no agent shall have power to waive any of its conditions except by writing indorsed on or attached to the policy.<sup>76</sup>

**25. Payment Delayed After Proof of Loss.**—The clause providing that "payment of any loss or damage shall be made within sixty days after satisfactory proof thereof shall have been made to the company" means that suit

<sup>72</sup> 107 Mich. 323 (1895).

<sup>73</sup> 10 Fed. Rep. 347, 350 (1881).

<sup>74</sup> 29 Mich. 241 (1879); 86 Ala. 558 (1888); 38 Pa. 130 (1861).

<sup>75</sup> 10 Fed. Rep. 347 (1881).

<sup>76</sup> 90 Mich. 302 (1892).

cannot be maintained until sixty days after delivery of preliminary proofs, which are or should be accepted as satisfactory and, if suit be started before that time, it is premature."<sup>77</sup>

**26. Arbitration Clause.** — The arbitration clause, which requires the award of arbitrators as to the amount of damages, is a valid contract, and a compliance or attempted compliance with it is a condition precedent to suit."<sup>78</sup>

#### PAYMENT OF LOSS

**27. Personal Property.** — Indemnity being the basis of the contract, the amount named in the policy is the limit of the insurer's liability. Where personalty is destroyed, the insured is entitled to receive the actual cash value thereof. This value is determined by its market value at the time and place destroyed. Neither the cost of the property, nor the cost of replacing it, is the measure of damages, although it may be satisfactory evidence in helping to fix it."<sup>79</sup> The insurance covers the entire loss of property by fire, if within the limit of the insurance, and no deduction is to be made because the entire value of the property, the subject of insurance, was much greater than the whole sum insured by the policy. To the extent of the loss, if not beyond the amount of the policy, the party may recover without any deduction by reason of the fact that the whole property was not destroyed."<sup>80</sup> Where the different articles of property are separately described in a policy and insured for specific sums, the damages allowed for the destruction of any article cannot exceed the amount for which it was insured."<sup>81</sup>

**28. Real Property.** — There is no other rule of damages in an action on a policy of insurance against fire, where the insured building is totally destroyed, except that of indemnity to the insured for his actual loss."<sup>82</sup> Where a loss occurs under a policy of insurance against fire, and suit is brought on the policy, the valuation in the policy is not the

<sup>77</sup> 10 Fed. Rep. 347 (1881).

<sup>78</sup> *Ibid.*

<sup>79</sup> 124 Ind. 176 (1890); 92 Mich. 594 (1892);

1 Rob. (La.) 438 (1842).

<sup>80</sup> 6 Cush. (Mass.) 440 (1850).

<sup>81</sup> 21 Hun (N. Y.) 83 (1880).

<sup>82</sup> 11 Metc. (Mass.) 195 (1846).

controlling proof of actual value, but the jury must find from the evidence what the actual value of the building was, and that must not be what it would cost to rebuild, but what is shown to be its money value under all the circumstances of its situation and surroundings at the time of the fire.<sup>83</sup> The just mode of fixing the value, although the rule may not be of universal application, is the value of the building as it stood upon the ground on the day it was destroyed as compared with a new building of the same kind and dimensions.<sup>84</sup> And this is construed to mean the real value of the building as such, not its relative value to the insured.<sup>85</sup> If the building were old and dilapidated by use and decay, its value in that condition is what the insured should recover.

**29. Option to Rebuild.**—The privilege reserved by insurers to repair or rebuild the property destroyed is a reservation for the benefit of the company which they may adopt or not, as they think proper. But the insurer must elect whether he will pay the damage or rebuild, and an election once made is irrevocable. It fixes the rights and duties of the respective parties to the contract. Such a reservation, and an election under it, is presumed to have been made in view of the laws and ordinances in force at the date of the policy, or of the election. And for this reason it has been held that after a partial loss of a frame building, and an election to repair, it is no excuse for failure to complete the repairs that the building inspectors, acting under a city ordinance, prevented the insurers erecting a frame building, since they could have erected it of brick or other material equally as or more costly than wood. The insurers in such case, having failed to complete the repairs, the insured himself rebuilt with bricks; and it was held he was entitled to recover not only the cost and damages for delay, but the rental value of the property was also held to be a proper element to be considered in ascertaining the amount of damages.<sup>86</sup>

<sup>83</sup> 98 Pa. 451 (1881).

<sup>84</sup> 11 Bush (Ky.) 587 (1875).

<sup>85</sup> 135 Mass. 503 (1883).

<sup>86</sup> 37 Pa. 205 (1860); 36 Barb. (N. Y.) 614 (1866); 65 Ill. 124 (1871); 108 Pa. 474 (1885).

## ASSIGNMENT

**30. Transfer of Subject-Matter Does Not Carry the Insurance.** — The contract of insurance does not, unless by extraordinary and express stipulations of the parties, run with the subject-matter of the insurance. Thus, a sale of property insured does not carry with it the policy of insurance. The policy is not an insurance of the specific thing without regard to the ownership, but is a special agreement of indemnity with the person insuring against such loss or damage as he may sustain. When he parts with the title to, and possession of, the property, and has no other interest in it, he can sustain no loss or damage by its destruction, but the loss, if any, is that of his grantee. In the absence of an assignment, the grantee cannot recover on the policy, because the insurer has no contract with him, and the grantor cannot recover because he has sustained no loss. The contract is terminated and nothing remains to the insured but a right to the return of the unearned premium.<sup>87</sup>

**31. Consent of Insurer to Transfer.** — Where on a sale of the property, the seller assigns his policy to the purchaser, and this is made known to the insurer and is assented to by him, it constitutes a new and original promise to the assignee to indemnify him in like manner while he retains an interest in the estate; and the exemption of the insurer from further liability to the seller and the premium already paid for insurance for a term not yet expired, make a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee.<sup>88</sup> In the absence of statute or clause in the policy itself, the consent of the insurer must be obtained even though the policy run to the insured, his executors, administrators, or assigns. In some states, statutes provide that the insured may in all cases assign the policy with the property, and in those jurisdictions the consent of the insurer is not necessary.<sup>89</sup>

<sup>87</sup> 55 N. H. 457, 458 (1875); 4 Pa. Super. Ct. 100 (1897); 9 Ill. App. 571 (1881).

<sup>88</sup> 55 N. H. 457, 460 (1875).

<sup>89</sup> 38 Cal. 541 (1869); 34 Iowa 87 (1871).

Where a policy of insurance requires that before the property covered by the policy shall be transferred or conveyed or the policy assigned, the consent of the company indorsed thereon in writing shall be obtained, if such condition be not complied with, the policy falls. The duty of procuring such consent rests with the insured. If he fail in his efforts, or neglect to comply with the requirements, the contract is at an end by force of its own terms. A mere notice of a transfer is not sufficient, nor is it necessary for the company to give notice of its disapproval.<sup>90</sup>

**32. Assignment of the Policy Where There Is No Transfer of the Property.**—An assignment of the policy will be upheld, as between the parties, as an equitable assignment of a contingent right to the money where there is no transfer of the property. When the loss happens, it becomes a vested right. The insurer has a right to know, and an interest in knowing, for whom he stands as insurer. He may be willing to insure one person, and unwilling to insure another, while the owner of a particular parcel of property. He may have confidence in the honesty and prudence of the one in protecting the property, thereby lessening the risk, and may have no confidence in the other. But these considerations have no application to the assignee of the policy, for it makes no difference to the insurer to whom he pays the insurance in case of loss. If it be a condition of the insurance that the policy shall not be assigned without the assent of the insurer, the assignment would be void without such assent, or the policy would be void if such were the proviso; but, in the absence of such provision, there is no objection to assignment without such assent.<sup>91</sup>

The policy may be assigned after the loss occurs, the insured retaining his interest in the property insured up to the time of the loss, the assent of the insurer in such case not being essential. If the estate be conveyed before the loss happens there can be no recovery upon the policy by any one, unless the policy be also assigned to the assignee

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<sup>90</sup> 95 Pa. 45 (1880).

<sup>91</sup> 38 Cal. 541, 545 (1869).



of the estate, with the assent of the insurer.<sup>92</sup> The insurer has the right to choose the persons with whom he will contract, and a stipulation that the policy shall not be transferred to the grantee of the property insured, without the consent of the insurer, is but the exercise of that right and is of undoubted validity.<sup>93</sup>

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## MARINE INSURANCE

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### DEFINITION AND NATURE

**33.** Marine insurance is a contract whereby one party for a stipulated sum undertakes to indemnify the other against loss arising from certain perils or sea risks to which his ship, merchandise, or other interest may be exposed during a certain voyage or a certain period of time.<sup>1</sup> Every contract of marine insurance contains information on the following points: (1) The consent of the contracting parties in relation to all the subjects enumerated; (2) the subject insured; (3) the sort of danger from which the subject is insured; (4) a fixed or determinate sum to be paid in the event of a loss from the danger insured against; (5) the sum or premium which the insured gives, or binds himself to give, to the insurer as a compensation for his undertaking the risks; (6) the voyage, or period of time, for which the insurance is made.<sup>2</sup> The matters relating to the form of the policy, and other requisites are treated elsewhere in this title.<sup>3</sup>

The person insured is usually a merchant or ship owner, but may be any person who has an insurable interest in the property insured. The merchant or ship owner need not himself effect the insurance, but may, and frequently does, employ an insurance broker to act for him, whose remuneration consists of a percentage of the amount paid to the underwriter, which is termed the premium. In the United

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<sup>92</sup> 38 Cal. 541, 545 (1869).

<sup>93</sup> 4 Pa. Super. Ct. 100 (1897).

<sup>1</sup> Arn. Mar. Ins. (6th Ed.) 16.

<sup>2</sup> (1898) 2 Q. B. (Eng.) 351.

<sup>3</sup> See *subtitles* Form of Contract, Policies  
*supra*.

States, a large proportion of all marine insurances are effected by factors, consignors, and other mercantile agents, on account of their foreign correspondents.

Marine insurance is only valid when it conforms to the requirements of the law. Insurance which contravenes the laws of revenue and trade of the state in which it is effected, or which contravenes the rights of the state as a belligerent power, or which is in derogation of the duties of the state as a neutral power, is illegal and void. A policy effected on a vessel or cargo in a trade in violation of the law of nations is invalid.<sup>4</sup> The contract is one recognized by the general law and usage of nations, and therefore either alien or native may be insured. In England, it is settled that the insurance of an enemy's property is illegal. The same rule is recognized by jurists on the continent of Europe; and, in the United States, it is declared to be the established law. Such contracts made before the outbreak of war are annulled by it.<sup>5</sup>

**34.** Marine insurance is a contract requiring the utmost good faith. The insured and the insurer are reciprocally bound to disclose to each other all facts within their knowledge which tend to elucidate the true character and importance of the risks which are intended to be insured.<sup>6</sup> In order to avoid the policy, it is not essential that misrepresentation or concealment of material facts should have been the result of fraudulent design, but the effect is the same whether it resulted from fraudulent design or from mere ignorance, mistake, or inadvertence, provided the facts misrepresented or concealed were material to be known, so that it cannot be said, had the facts been known, that the parties would have entered into the obligations which they did.

In general, concealment or misrepresentation of material facts has the effect of rendering the contract of insurance void in its origin for want of reality of consent in the parties. There are, however, many cases in which the effect

<sup>4</sup> 3 Wash. (U. S.) 276 (1814).

<sup>6</sup> 1 Pet. (U. S.) 170, 185 (1823).

<sup>5</sup> Bouv. Law Dict., citing 4 East (Eng.) 396 (1803); 3 Kent's Comm. 256.

is not to vitiate the contract, but merely to discharge the insured from a loss directly traceable to the facts concealed. It is the duty of the insured to inform the insurer of all facts which are material to the risk, but which are not known, or presumed to be known, by the insurer. The duty extends even to the disclosure of all intelligence or information in his possession relative to facts. It is sufficient to avoid a policy if intelligence be concealed which, had it been communicated, might reasonably have influenced the judgment of the insured. In one case, the policy was canceled where the insured had omitted to communicate a vague and doubtful account of the prior capture of the ship, upon the ground that, had the rumor been communicated to the insurer, he would probably have insisted upon a larger premium.<sup>7</sup> In general, it may be said, the information necessary to be given by the insured may be grouped under the following heads: (1) The state and condition of the ship or property insured; (2) the nature and extent of the interest of the insured; and (3) the extraordinary perils, arising from extrinsic causes, to which the property has already been or may probably be exposed. Conversely, the insured is not bound to communicate to the insurer facts which he is presumed, from his occupation, to know; or facts of which he expressly or by inference of law has waived information, or which are covered by a warranty, or which relate to a risk excepted from the policy, or which have no necessary relation to the risks, or which tend to diminish the risks assumed by the insurer.<sup>8</sup>

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#### SUBJECT-MATTER

**35. In General.**—The subjects of property which it is the object of marine insurance to cover are, in general, the vessel itself, and the cargo of the vessel. Subordinate or ancillary to these are a variety of inferior interests, such as freights, advances, profits, commissions, and the like. In general, it may be said that any interest in property entrusted

<sup>7</sup> 2 P. Wms. (Eng.) 170 (1723).

<sup>8</sup> 2 Duer (N. Y.) 434, 552 (1853).

to the sea, whose loss would entail a pecuniary damage upon the insured, may be insured. Any reasonable expectation of pecuniary profit from the preservation of the subject-matter is insurable as a marine risk; as, where the joint owners of a vessel and cargo engaged in a joint adventure have a lien for their several interests and for advancements, each joint owner has an insurable interest in the joint venture.<sup>9</sup> It is not necessary that the party should have any interest in the property at the moment the insurance is effected, unless the risks mentioned in the policy have already commenced. If the contract be prospective, it is sufficient if the interest intended to be covered will come into existence when the policy attaches. Insurance on goods and on freight is frequently made before the title of the insured has accrued, and the same law which holds such insurance valid applies equally to insurance on the ship itself.

**36. Freight.**—In the law of marine insurance, freight is the benefit derived by the ship owner from the employment of his ship.<sup>10</sup> It is either the price which the shipper of the goods pays for the carriage of his goods, or the price which a charterer or hirer of the ship agrees to pay for the use of the ship, or the benefit and advantage which the ship owner who carries his own goods in his own ship expects to derive from the increased value of the goods when they reach their port of destination.<sup>11</sup> The insured must, therefore, in some way or to some extent, be an owner of the ship, because it is only an owner of the ship or some one occupying that position who is entitled to freight. Any one who has an interest in the safe transportation of property may insure it in the name of the freight.<sup>12</sup>

Where the ship has been hired or chartered, the ship owner has an insurable interest in the freight as soon as the ship has commenced the voyage described in the charter party. The charterer, also, by hiring the whole ship, or a definite part of the tonnage, without any express

<sup>9</sup> 124 Pa. 61 (1889); see *sub*title Insurable Interests *supra*.

<sup>11</sup> 154 Pa. 242 (1893).

<sup>12</sup> 4 Pick. (Mass.) 429, 435 (1827).

<sup>10</sup> 1 B. & Ad. (Eng.) 48 (1830).

agreement to carry only his own goods, has the right to carry the freight of third persons, and thus may acquire an insurable interest in such freight precisely as the ship owner stands who contracts to carry the goods of shippers.<sup>13</sup> The ship owner and the charterer sometimes arrange in the charter party for a division of the perils of the sea, in which case each party has an insurable interest only against the respective risks assumed.

**37. Advances.**—Loans made to the ship owner are called advances. A mere loan to the owner, to be repaid at all events, and with no reference to the arrival of the goods or the completion of the voyage, creates no insurable interest in the money advanced, since there is no assumption of risk from the perils of the sea. If a vessel, meeting with some accident on her voyage, be compelled to put to port for refuge, where she incurs expenses which are paid by the ship's agent on behalf of all interests, such advances being payable by ship, cargo, and freight in certain proportions at the end of the voyage, may be insured by the payer of them from the port of refuge to the port of destination.

Formerly, the most ordinary form of advance was the bottomry bond, or loan on the security of the ship. A captain, finding himself in a foreign port unable to raise funds on his own or the ship owner's credit to defray his expenses, was empowered to raise the money by the pledge of the bottom of his ship, such advance to be repaid within a specified time if the vessel reached her destination, but to remain unpaid if the vessel were lost. A respondentia bond was a similar transaction, in which the cargo only was pledged as security. If the ship were lost, the loan was not recoverable. Where both the ship and the cargo were pledged for a loan, the document embodying the transaction was called a bottomry and respondentia bond. By custom now, in the United States at least, bottomry bonds may be made by the ship owner in the home port, and before the ship has sailed; but the master is still restricted to the making of such bonds

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<sup>13</sup> 16 Pick. (Mass.) 289 (1835)



only from strict necessity, and when he is at such distance from the owner that to communicate with him would be an injurious delay. The laws of France forbid the borrower on bottomry to insure the amount he has borrowed. In Germany, the lender on bottomry may insure his loan and the maritime interest. The Italian and new Spanish codes provide that on ship and goods only the excess of what is covered by bottomry or respondentia may be insured.<sup>14</sup>

**38. Profits.**—The expected increase in the value of goods when they have escaped the perils of the sea and arrived at their port of destination are known as profits. One who insures profits on an open policy is required to prove the amount of profits the goods would have earned if they had not been lost. One who insures on a valued policy is entitled to the whole valuation, irrespective of any proof that the goods would have made profits, had they arrived safely.

**39. Commissions.**—Commissions are the profits expected to be realized by commission merchants from the sale of cargoes consigned to them from abroad. Such commissions, being dependent upon the safe arrival of goods, may be insured against the perils of the sea as soon as the consignment has been made. There is a great similarity between freight, and profits and commissions, the difference being that in the first the interest arises from the fact of the employment of the ship, while in the other two it arises from the goods or cargo.

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## POLICIES AND PREMIUMS

**40. Policies** of marine insurance, with respect to the mode of estimating and proving the interest of the insured in the event of a loss, are either open or valued; the nature of each has been explained. With respect to the commencement, duration, and termination of the risks insured against, policies are either (1) upon the voyage, (2) upon time, or

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<sup>14</sup> See *The Law of Property: Bottomry and Respondentia Bonds*.

(3) upon both voyage and time. *Insurance upon the voyage* is when the ports at which the risks are respectively to commence and end are named or sufficiently defined in the policy. *Insurance upon time* is where the risks assumed are unrelated to any particular voyage, but are to commence and end at determinate days named in the policies. *Insurance upon both voyage and time* is where a particular voyage is in contemplation, but the risks of the voyage are yet limited to commence and end at determinate days named in the policies, as in the case of a vessel plying between New York and Liverpool, insured for one year, beginning on a certain day. It is the custom of the principal merchants in the city of New York, and in most of the other large cities of the United States, to cover all their shipments by a general standing time policy on goods, the terms of which are so extensive as to embrace not only all outward and homeward shipments made on their own account, but all shipments made to them from foreign ports upon which they are directed to effect insurance.<sup>15</sup>

The rules as to the assignability of marine policies are ordinarily the same as apply to insurance policies generally, heretofore explained. A marine policy may, and frequently is, made assignable with the property insured; and a loss made payable to the insured or "to any other person who may be the owner at the time of the loss," confers upon the transferee of the property all the rights of the party originally insured. Some marine policies require that the underwriter shall be notified, not only of a change of ownership of the vessel or its cargo, but also of a change of masters. In such a case, if a vessel be lost while under the charge of a master of whose employment the underwriter has not been informed, the underwriter is discharged from liability, notwithstanding it may appear the master was not guilty of any negligence which produced the loss.<sup>16</sup>

41. The **premium** is ordinarily regarded as due when the policy is delivered, but in the United States, where

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<sup>15</sup> Duer Mar. Ins., Vol. 2, p. 117.

<sup>16</sup> 14 Mo. 46 (1851).

marine insurance is almost exclusively effected by incorporated companies, it is usually paid by a promissory note, called the premium note, which is given at the time or shortly after the policy is delivered. In England, marine insurance is generally effected by brokers, who assume liability to the insurer for the premium, and stand with relation to the underwriter in the same position as the party insured stands in this country. The premium being a sum paid in consideration of indemnity against certain risks, if those risks should be incurred, it follows, if no part of any risk attach, either because no part of the goods be shipped, or because no part of the voyage takes place, or for any similar reason affecting the consideration upon which the premium was given, that the whole premium must be returned to the insured.<sup>17</sup> It is now the practice of many insurance companies to insert a clause in their policies, giving them the right to retain a portion—usually one-half of one per cent.—of the premium thus made returnable. It is usual also to insert a clause that the insurers shall return so much of the premium as affected property from which they were discharged by any prior insurance.<sup>18</sup> Where the premium has not been paid by the insured, the right to a return of it simply becomes a defense to any claim made for it, though the rule is otherwise where a negotiable note was given for it, which has been put in circulation; in which case the insured is entitled to his return premium in the same way as if he had paid it in cash.<sup>19</sup> The assignment of the policy transfers no right to the assignee to demand a return of the premium paid.<sup>20</sup>

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## AGENTS

**42. Authority to Insure.**—Marine insurance effected by agents is only valid when effected in pursuance either of a prior authority or of a subsequent adoption by the principal. A party insured who seeks to recover a loss must show affirmatively that the insurance was made by the agent,

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<sup>17</sup> 1 Mass. 436 (1805).

<sup>18</sup> 3 Johns. Cas. (N. Y.) 1 (1802).

<sup>19</sup> 14 Mass. 121 (1817).

<sup>20</sup> 4 Cush. (Mass.) 203 (1849).

either by virtue of express or implied directions given him, or was subsequently ratified by his adoption. If the law were otherwise, insurance would cease to be a contract of indemnity, and the name and interest of a third person would be alleged only as a cover for wagering contracts.<sup>21</sup> One partner has power to bind the partnership by a direction to have partnership property insured. Where the partnership is not general, but limited to a single enterprise or voyage, some of the courts hold that one partner has no power to insure beyond the value of his own individual share; but the weight of authority confers upon him the power to bind all his copartners, as in the case of any other contract relating to the partnership business.<sup>22</sup> On the other hand, it is well settled that a tenant in common or part owner of a vessel or its cargo has no power to insure beyond the value of his own individual interest in the property.<sup>23</sup>

The master of a ship has no general power, by virtue of his position, to insure the vessel, or its freight or cargo; but the better opinion is that, under special exigencies arising from mishap or vicissitude while at sea or abroad, it would not only be his implied right, but his positive duty, to protect the property under his charge by effecting a new insurance. The consignor, or real owner of a cargo, has an undoubted right to insure his property. A consignee, however, who has no interest and no lien on the goods consigned to him for sale, has no implied power to insure the same goods without the authority or consent of the consignor. If it were otherwise, the latter might be charged against his wishes with a double premium, as well as be exposed to the hazard of a total loss without a possible indemnity. Where, however, the consignee is not a mere naked consignee, but is interested in the property by reason of advances made upon it, he may certainly infer that the business of insuring is left to himself, and he has therefore implied authority not only to cover his own interest, but to insure to the full value of the property consigned on behalf of his consignor.<sup>24</sup>

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<sup>21</sup> Duer Mar. Ins., Vol. 2, p. 97.

<sup>22</sup> *Ibid.*, p. 98.

<sup>23</sup> 11 Pick. (Mass.) 85 (1831).

<sup>24</sup> Story Ag. (2d Ed.), Sec. 111

**43. Duty to Insure in Certain Cases.**—Cases exist in which the agent is expected to insure the principal's property, and it is his duty to do so. The law implies such a promise on the part of the agent, and creates such a duty, (1) where the principal has funds in the hands of his agent or correspondent, the application of which rests in his own discretion; (2) where the agent has no funds of his principal in hand, but by an established course of dealing has been in the habit of advancing the premium and effecting the insurance; (3) where a consignee receives a bill of lading containing an express order to insure, and accepts the consignment. An exception exists, however, where the consignee finds that the insurance, from circumstances which could not have been foreseen when the directions were given, would tend to his principal's loss and prejudice, instead of to his indemnity.

**44. Duties as to Losses.**—It is the duty of the agent to collect, receive, and pay over the losses which may occur and fall due under the policy; and for any default in the performance of this duty he is answerable in damages to his principal. An agent who holds the policy of his principal has an implied power to collect the loss, and a payment to him is a discharge of the insurer from further liability, provided the payment be made in good faith, be in money, and be made without any respect to the state of accounts existing between the agent himself and the insured.<sup>25</sup>

**45. General Duties and Liabilities.**—It is the duty of the agent to transmit to his principal full and just accounts of all his transactions, to keep him informed of all occurrences calculated to affect his interests, and to deliver up, when requested, and upon the satisfaction of his charges and liens, the policy of insurance, which is, in all cases, the sole property of the insured, and for the recovery of which he may maintain an action, not only against his agent, but against every person into whose hands, in violation of his rights, it may have come.

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<sup>25</sup> 6 Mass. 193 (1810).



The most important and responsible duty of every agent, in effecting an insurance, is to see that the policy effectually covers the property and risks which he was employed to insure. Where an agent, acting under instructions to effect insurance, employs another broker to perform the work, he is, in general, liable to his principal for all those injurious acts of his subagent which he knew, and knowing, should have guarded against. It is his duty to give immediate notice to his principal if he find it impracticable or impossible to effect the insurance with which he was entrusted. If the omission to discharge this duty entail loss upon the principal, the agent becomes liable for the loss occasioned. The duty to give immediate notice to the principal applies equally where, having effected a policy, the agent finds that it fails to secure to the principal the full indemnity required by his instructions. It is also his duty to disclose to the insurer all the information in his possession which is material to the risks insured against; for it is well settled that concealment or misrepresentation of material facts by an agent, whether intentional or undesigned, will have the same effect on the validity of the contract of insurance as if made by the principal himself. This duty is one which the agent owes likewise to the principal; for if, by its violation, a policy be rendered inoperative and the principal be prevented from recovering a loss, the latter may have his action against the agent for damages, except where he himself has been a party to the fraud or neglect.

In general, it is the duty of all insurance agents to select insurers of unimpeached and unsuspected solvency. When, however, the agent has exercised good faith and the necessary caution in making his selection, he is not, in general, responsible for the ultimate solvency of the insurers selected. In the United States, the mere insolvency of the insurers confers no power upon the agent to effect a second policy, for the reason that a second policy is wholly void, under a clause in most American policies, while the first policy is still in force; and the first policy is necessarily in force until annulled by the agreement of the parties, and is unaffected

by the insolvency of the insurers. In England, when the insurer is declared a bankrupt, the insured is admitted to claim under a commission, even where the risks of the policy are yet undetermined; but as no power exists in the commissioners of bankruptcy to rescind the policy and return the premium, it is probable that the mere bankruptcy of the insurer confers no authority upon an agent to effect a second insurance. The general principles of the law of agency apply to insurance agents and brokers, to which reference is made for substantive law on this subject.<sup>26</sup>

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## LLOYD'S INSURANCE

**46. Definition.**—Lloyd's, or Lloyd's insurance, is the term applied in the United States to incorporated companies or associations of individuals organized to carry on a system of insurance upon certain stipulations and conditions evidenced by written agreement. The system is similar to the English associations of the same name and originated in connection with marine risks, but it has been extended to fire and accident insurance.<sup>1</sup>

**47. History.**—The term *Lloyd's* is derived from the name of Edward Lloyd, the proprietor of a coffee house, which flourished in London two hundred years ago, and was the resort of underwriters and merchants desiring to be insured. The name became permanently attached to the house as a place of business, and subsequently accompanied the business when those engaged in it established a new office for its transactions, in 1774, in the Royal Exchange, where an enormous business is done.<sup>2</sup> Formerly, in England, two insurance companies were incorporated by statute with a monopoly of the marine insurance business, and all others were restrained from granting insurances as companies or partnerships on a joint capital. This monopoly lasted until 1824, when it was abolished.<sup>3</sup>

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<sup>26</sup> See *The Law of Agency*.

<sup>1</sup> 107 Ala. 276 (1894).

<sup>2</sup> Pars. Mar. Ins., pp. 11, 12.

<sup>3</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 19, p. 448.

The original method of effecting insurance at Lloyd's was by the underwriters passing around the proposed policy of the applicant among the members so that each could underwrite and subscribe his name for such portion of the required amount as he wished to undertake, until by successive subscriptions the entire amount was covered.<sup>4</sup>

**48. Nature and Plan.**—In the United States, the principal features of this system of insurance are that each individual member of the association assumes a liability for a specific amount, just as formerly in England; attorneys or managers are appointed by a power of attorney authorizing them to be sued; and suits are brought against such attorneys or managers, each underwriter being bound to accept the result of the suit. One who signs a policy as attorney for the underwriters is held to be a trustee of an express trust. Proofs of loss are properly served at the office of the association on one acting as attorney, even if irregularly appointed.<sup>5</sup> In issuing a policy all the underwriters act together, and their united act is the act of the association. The contract of insurance is a contract of the association, and the premiums received belong to the association.<sup>6</sup>

**49. Liabilities.**—The liability on a policy in a Lloyd's association is several only. Each underwriter is only liable individually for a fixed amount, and in no case is liable for the whole or any part of another underwriter's liability.<sup>7</sup> In the ordinary case of a solvent society, the primary fund for the payment of losses incurred in the policies is a fund contributed by the individual members and placed in the hands of the manager or attorney of the association, together with the premiums received by him. It is frequently stipulated that resort may be had to the liability of individual members only in case the fund is exhausted.<sup>8</sup>

<sup>4</sup> 21 Misc. (N. Y.) 239 (1897).

<sup>5</sup> Bouv. Law Dict., citing 19 Misc. (N. Y.) 297 (1897); 20 Misc. (N. Y.) 297 (1897); 21 Misc. (N. Y.) 285 (1897).

<sup>6</sup> 36 N. Y. App. Div. 49 (1898).

<sup>7</sup> *Ibid.*

<sup>8</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 19, p. 451, citing 62 N. J. Law 16 (1898).

# THE LAW OF INSURANCE

(PART 4)

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## ACCIDENT INSURANCE

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### DEFINITION AND NATURE

1. **Accident insurance** is an indemnity against personal injury or loss of life by accident—that form of insurance which indemnifies against the effects of accidents resulting in bodily injury or death.<sup>1</sup> It is intended to furnish indemnity against accidents and death caused by accidental means, and the language of the policy must be construed with reference to that proposition.<sup>2</sup>

A complete conception of this form of insurance may only be had, perhaps, by having a correct idea of what an *accident* is, as regarded in law. **Accident** is variously defined to be something that happens without the intervention of the will of the person injured or affected thereby—something that occurs without the foresight or anticipation of such person; an event from an unknown cause, or an unusual and unexpected event from a known cause.<sup>3</sup> Judicial interpretation of accident, as applied to insurance, pronounces it an unusual and unexpected result attending the performance of a usual and necessary act, or an event that happens without the foresight and expectation of the insured;<sup>4</sup> and, again, the happening of an event without the aid or design of a person, and which is unforeseen.<sup>5</sup> If a result be such as follows

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<sup>1</sup> 155 Mass. 408 (1892).

<sup>2</sup> Bouv. Law Dict.

<sup>3</sup> 76 N. C. 320 (1877).

<sup>4</sup> 32 Md. 310 (1869).

<sup>5</sup> 112 N. Y. 472 (1889).

from ordinary means voluntarily employed, and in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, and unusual occur, which produces the injury, then the injury has resulted through accidental means.<sup>6</sup>

2. Several illustrations, from decided cases, of what are and what are not accidental injuries will serve to more fully explain what an accident is: Death, caused by drowning while insured was bathing in a river, is accidental within the meaning of the policy; being waylaid and killed, or injured, by robbers is accidental, for, while these facts are intentional on the part of the robbers, they are fortuitous events so far as the injured person is concerned;<sup>7</sup> where one while insane committed suicide by hanging, it was considered to be accidental death, as the event was fortuitous; where a person fell between the cars and was killed while in discharge of his duty as locomotive engineer, it was held to be accidental death within the meaning of the policy;<sup>8</sup> and where a person, on leaving a house, jumped from the platform four or five feet high to avoid a detour, sustaining internal injuries from which he died, it was decided that the death was the result of an accident, as there was something entirely unforeseen in the result of the jump.<sup>9</sup> On the contrary, where the insured, in the act of pulling on his stocking, caused displacement of an intestine, resulting in heart failure and death, it was held not to be accidental, for there was no involuntary movement of the body, such as falling backwards or forwards, but only such movement as the insured intended to make.<sup>10</sup> Death resulting from a fit is not accidental death;<sup>11</sup> nor, death resulting from the rupture of a blood vessel sustained while exercising with Indian clubs if the deceased used the clubs for exercise in the ordinary way and without the interference of any unusual circumstance. If, however, there occurred any

<sup>6</sup> 131 U. S. 100 (1889).

<sup>7</sup> 6 H. & N. (Eng.) 839 (1861); 104 Ind. 133 (1887).

<sup>8</sup> 32 Md. 310 (1869).

<sup>9</sup> 131 N. Y. 100 (1888).

<sup>10</sup> 26 Sc. L. R. 303 (1892).

<sup>11</sup> 31 Fed. Rep. 322 (1887).



unforeseen accident or involuntary movement of the body, which, in connection with the use of the clubs, brought about the injury, then such means were accidental and within the terms of the policy.<sup>12</sup>

3. Generally, in accident policies, a provision is present that the company does not assume the risk of death caused either wholly or in part by disease. The policy often provides that it does not cover death caused by disease, or jointly by disease and accident, or by weakness and exhaustion caused by such disease. The reason for this provision is obvious. Accident policies are issued without examination and frequently without any application. Travelers very often buy accident insurance policies with their railway tickets. There is no written application, nothing but the oral request for a policy. As there is no medical examination, it is but fair that the insured shall take the risk of his own health. It is, therefore, often necessary to determine when death is the sole result of accident within the terms of the policy. In one case the insured, while fording a stream, had an epileptic fit, fell into the water, and was drowned. He sustained no personal injuries, none at least that could cause his death. It was held that the death was accidental. The cause of the death was not the fit, but the drowning, which was considered purely accidental.<sup>13</sup> A similar instance was where the insured was standing on a platform at a railroad station, became suddenly ill, and fell into a fit in front of an approaching train and was killed. It was held that the death was not caused by the disease nor by the disease jointly with the accident, but the cause of the death was the approaching train; that it was accidental within the meaning of the policy.<sup>14</sup> Death caused by sunstroke from exposure to the heat, while the insured was on duty, was held not accidental within the meaning of the policy, but death produced by disease. Sunstroke is a disease produced by known causes and therefore cannot be considered as an accident.<sup>15</sup> Where the

<sup>12</sup> 8 Biss. (U. S.) 302 (1878).

<sup>13</sup> L. R. 6 Q. B. Div. (Eng.) 42 (1860).

<sup>14</sup> L. R. 7 Q. B. Div. (Eng.) 216 (1881).

<sup>15</sup> 46 Fed. Rep. 446 (1891).

insured died as a result of the infliction upon his body of putrid animal matter, such as is liable to happen to those working in wool sorting or in the leather business, it was held that death was the result not of accident but of disease.<sup>16</sup> Death caused by taking poison through mistake is clearly accidental death, within the terms of the policy.<sup>17</sup> Where, however, the policy provides that the company shall not be liable for injury or death caused by taking poison, the provision is held to mean that when injury or death results from taking poison in the ordinary sense of the word, that is, taking a poisonous substance internally, the company is not liable.<sup>18</sup> But it is not necessary that poison should be taken with intent to produce death. If it be innocently taken, and without knowledge of the injurious effect it is likely to produce, it still comes within the exception specified in the policy.<sup>19</sup>

4. The meaning of terms employed in an accident policy is also important as ancillary to a clear understanding of the contract. A policy does not use the word accident alone in describing the kind of injuries which it covers. The description generally is that the policy covers injuries or death arising from external, accidental, and violent means. The meaning is that all the three elements enumerated must be present as the cause of the injury or the death, before there can be a recovery on the policy. *External* means some agency outside of the body acting upon the man's vitality. The idea is that the force producing the injury should come from some source outside of the body; some material contact with the body must have taken place producing the injury. Thus, where the insured, while bathing, took a dive in the water, and, because of a sudden accidental turn of the body, his ear came in sudden contact with the surface of the water, so that the tympanum was ruptured, it was held to be an injury caused by external and accidental means and so within the policy.<sup>20</sup> In another case, while

<sup>16</sup> 123 N. Y. 304 (1890).

<sup>17</sup> 39 Ill. App. 509 (1891).

<sup>18</sup> 133 Ill. 556 (1891).

<sup>19</sup> 102 Pa. 230 (1883).

<sup>20</sup> 9 Pac. Rep. 348 (1886).

the insured was driving in a carriage, his horse became frightened and ran away, but was brought under control by the insured before any damage was done. Through fright and the violent exertions on the part of the insured in restraining the horse, the insured suffered so severely that he died within an hour. It was decided that his death was caused by external means within the terms of the policy.<sup>21</sup>

5. The term *violent*, as used in this connection, means a little more than the exercising of some degree of force; it may be very slight. Thus, the gentle flowing of illuminating gas into the room whereby the insured is suffocated is considered violent, and the resulting death is death through violent means within the meaning of the policy. Death resulting from taking poison is death through violence. The degree of force expended in the act of taking the poison is sufficient to satisfy the meaning of the word violent.<sup>22</sup> Where a man descended a well to fix something that had gone wrong, and was shortly afterwards found dead at the bottom, having suffocated from gas, the presence of which in the well was not suspected, his death was held to be accidental, because entirely unexpected; it was external, because the cause was from the outside of his body, the gas; and it was violent, because forceful enough to kill and, therefore, sufficient to satisfy the terms of the policy.<sup>23</sup> The policy may provide that in order to recover under it, there must be some external and visible mark of the injury. The reason for the provision is obviously to protect the company from fraudulent claims where there has been no injury. By this phrase is meant, not that the injury must be external and that the policy does not apply where the injury is wholly internal, but that there must be some external and visible signs of the injury. Visible signs within the meaning of the policy are not confined to broken limbs or bruises on the surface of the body. There may be other external indications

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<sup>21</sup> 80 Me. 251 (1888).

<sup>23</sup> 144 Pa. 79 (1891).

<sup>22</sup> 112 N. Y. 472 (1889); 133 Ill. 556 (1890).

or evidences which are visible signs of internal injuries. Complaint of pain is not a visible sign; complaint of internal soreness is not such a sign. But if the internal injury produce a pale and sickly look in the face, if it cause vomiting, if to the observation of the eye, in the struggle of nature, there are present any signs of injury, these are external and visible signs, provided they be the direct result of the injury.<sup>24</sup> Nor need the signs appear immediately after the injury. Such construction would defeat all claims for internal injuries not apparent to the eye at once. Thus, where the insured suffers a strain as the result of an accident, and no signs of the injury are visible immediately after the accident, but signs of the injury appear soon thereafter as a result of the accident, he can recover on the policy.<sup>25</sup> Nor is it necessary that the signs of the injury be visible to the eye. It is sufficient if the injury can be ascertained by applying the hand to the exterior of the body; as where the injury of the insured consists of a strain of his diaphragm and recti muscles, which can be ascertained by manipulating the muscles and finding them rigid and tense, these are external and visible signs of the injury within the meaning of the policy.<sup>26</sup>

The provision with reference to the external and visible signs of the injury has no application to the case where the insured dies as the result of the accident. In such a case, the company need not seek protection from fraudulent claims; death itself is sufficient visible sign of the result of the accident. It does not require any more than the appearance of the body after death to demonstrate that life has left the body. For instance, where the insured is drowned, and there are no visible signs of violence on his person, the company will be liable on the policy.<sup>27</sup>

<sup>24</sup> 23 Fed. Rep. 712, 715 (1885).

<sup>25</sup> 89 Iowa 468, 470 (1892).

<sup>26</sup> 66 Hun (N. Y.) 600 (1893).

<sup>27</sup> 47 N. Y. 52 (1871).

## NATURE OF THE CONTRACT

6. Accident insurance in one respect is the simplest contract of all kinds of insurance. This is especially so with that particular plan of insurance that is made with the "ordinary despatch of a purchase and sale," as an authority terms it. "A passenger about to take the cars buys his ticket of insurance as he buys his ticket for fare, and oftentimes of the same person. In each case, the ticket is evidence of a contract, completed and binding on both parties. And, as in other cases, a parol contract to insure or to issue a policy is enforceable, the former at law and the latter in equity, so here a promise to make out a policy or to forward the requisite ticket may be enforced by the appropriate remedy, as where a party on his way to the cars meets the agent of the company, pays for an insurance for one day, and without waiting for his policy or ticket, which the agent promises to send him, proceeds to the cars, and thence on his journey without having received either. The contract is, nevertheless, complete and valid."<sup>28</sup>

There is, however, that other and more systematic, and now common, kind of contract in accident insurance which contemplates an application and a policy. The application is a statement of facts relating to the applicant, and gives his name, age, residence, occupation, and other warranties regarding his habits and health. Upon signing such application, the applicant becomes entitled to, and usually receives, a policy issued by the insurance company and signed by one or more of its principal officers. Usually the application is made part of the policy, and where the latter provides that "in consideration of the warranties in the application, a copy of which is indorsed hereon, and made part hereof, and of —— dollars" the company "hereby insures," the application constitutes a part of the contract of insurance. In such case, there can be no recovery if the statements in the application be not true.

<sup>28</sup> May Ins. (4th Ed.), Vol. 2, p. 1,264, citing 5 Lans. (N. Y.) 71 (1871).



If the application be not made part of the contract, the truth of the statements made by the insured in applying for the policy must be determined, in case of a suit thereon, by the jury, in which case a recovery will be defeated, if the statements be found both material and untrue.<sup>29</sup>

7. Two plans of doing business in accident insurance are common. The one is the system in operation in Europe, in which the organs of the body are appraised at a specified sum, and the company agrees to pay a certain fixed amount for the loss of a hand, the breaking of a leg, the loss of an eye, and like injuries. The other is the plan in vogue in the United States by which the company promises indemnity for injury, or compensation for death by payment of a fixed sum if the insured die in consequence of an accident. Both plans are sometimes combined in the policies issued in the latter country. Some policies cover all classes of accidents, and others are limited to certain specified accidents, such as those happening while traveling by public conveyance.<sup>30</sup>

The matter of payment of premiums is governed by the same general rules of law that govern other insurance. Ordinarily, all policies specify the amount of consideration or premium, reciting the length of time the insurance is to endure in consideration of the amount paid, with an agreement express or implied for a renewal of the policy upon the payment of an additional sum yearly, semiannually, quarterly, or by instalments at various times, according to the character of the company and the terms agreed upon. It is usually provided that there shall be no recovery on the policy for injuries received during any insurance period for which the premium has not been paid, or, in other words, that the policy, or any renewal thereof, shall not take effect unless the premium be actually paid previous to any accident under which the claim is made. In a beneficial association, as has been seen, the contract is evidenced by a certificate or policy issued under the seal of the society, taken in

<sup>29</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 286, citing 133 Ind. 376 (1892); 62 N. W. Rep. 1,057 (1895); 67 Fed. Rep. 460 (1895).

<sup>30</sup> Nib. Ben. Soc. and Acc. Ins., Sec. 363.

connection with the by-laws of the order, and its charter or articles of association. A beneficial fund is created for the payment of sick or death benefits, which fund is derived from the contributions of the members made in pursuance of assessments levied at more or less regular intervals, as set out in the constitution and by-laws of the society. Fixed dues intended for the support of the society and, also, in some instances, to swell the beneficial fund, are required to be paid by the members according to rules prescribed.<sup>31</sup> Much of the accident-insurance business of the United States is carried on by mutual-benefit societies organized on plans similar to those of beneficial associations.

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#### CONSTRUCTION OF THE CONTRACT

8. **Want of Due Diligence.**—While the general rule of law is that when a man is injured through his own want of care he cannot recover, yet, when he insures himself against death or injury resulting from accidents, the mere fact that he himself, in part or wholly, contributed to his injuries by not exercising sufficient care, will not prevent him from recovering under the policy. One of the dangers against which the insured desires to protect himself is this very carelessness on his part; nor is there anything in the law which prevents a man from protecting himself against injury to himself caused by his own want of care.<sup>32</sup> Insurers sometimes make provisions absolving themselves from liability where injury occurs through the carelessness of the insured, and prescribe that the insured must exercise due diligence for his personal safety, and that the company is not liable for injuries resulting where the insured voluntarily exposes himself to unnecessary danger, or for accidents which arise from exposure by the insured to obvious risks. In case there is a doubt as to the proper construction of these provisions, as well as any other provisions in the policy, the doubt will be resolved strictly against the company and liberally in favor of the insured. This is the

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<sup>31</sup> See *The Law of Beneficial Associations*.

§ 32 Md. 310 (1809).

general rule and is based on the principle that, as the contract was constructed by the company, it could clearly express their intention.<sup>33</sup>

Due diligence means that the insured must exercise such care as a prudent man exercises. Thus, where the insured, constructing a house, was on the second floor supervising the construction, and, while stepping on a joist, which broke from a hidden defect, fell and was killed, it was held that his beneficiary could recover on the policy. He did not violate the clause of the policy which required him to use due diligence for his personal safety and protection.<sup>34</sup> Where the insured crossed a railroad track where many people did the same, and was hit by a detached car, the sight of which was obstructed by an umbrella which he was carrying, it was held that he did not violate the provision against using due diligence.<sup>35</sup> Where, however, the insured dies by falling from the platform of a railroad car, between eleven and twelve o'clock at night, while the train was in full motion, there can be no recovery if the policy provide that it does not cover injuries caused by exposure to unnecessary danger. Negligence and exposure to unnecessary danger mean the same thing—the want of due diligence.<sup>36</sup>

### 9. Voluntary Exposure to Unnecessary Danger.

A conscious intentional exposure is implied in the express provision in a policy against voluntary exposure to unnecessary danger—something which one is consciously willing to risk. If a person place himself in a position where he is exposed to an obvious danger, and the precise injury happen to him which there is reason to fear, he is within the above provision of the policy and cannot recover.<sup>37</sup> Moreover, if a man act so recklessly and carelessly that he shows an utter disregard of a known danger, he may be said to have exposed himself voluntarily to danger.<sup>38</sup> Or, if the risk of danger be so obvious that a prudent man, exercising reasonable

<sup>33</sup> 41 Fed. Rep. 506, 509 (1890).

<sup>34</sup> 34 N. J. Law 371 (1871).

<sup>35</sup> 36 N. E. Rep. 891 (1894).

<sup>36</sup> 15 Blatch. (U. S.) 216 (1878).

<sup>37</sup> 92 Tenn. 167, 187 (1893); 36 N. E. Rep. 891, 892 (1894).

<sup>38</sup> 134 Mass. 175 (1883).

foresight, would not have done the act, then the injured person may be said to have exposed his person to danger.<sup>39</sup>

These principles are well illustrated by a few cases: Where the insured while running either on or close to the track of a railroad, in front of an approaching train, in order to reach a train coming in the opposite direction on another track, was killed, it was held that his beneficiaries could not recover, because he broke the condition of the policy not to voluntarily expose himself to unnecessary danger. The danger which caused death was obvious and the exposure unnecessary. The man was either conscious of the danger of being struck by an approaching train, or there was an utter disregard on his part of the danger. In either instance, there was a voluntary exposure within the terms of the policy.<sup>40</sup> In another case, the insured was injured while cleaning a gun, handling it in the usual way, and believing it to be unloaded, but which being loaded was discharged in handling by reason of a defect in its lock, which was unknown to the insured. It was held that the insured was not guilty of a voluntary exposure to unnecessary danger.<sup>41</sup> One who was a switchman by occupation was killed while in the discharge of his regular duty as a yard switchman as he was handling broken cars. It was held that death did not arise from voluntary exposure to danger, but from accident.<sup>42</sup> Another was killed in attempting to board a train from the platform while the train was moving at less speed than a man could walk. It was decided that this was not a voluntary exposure. It was imprudent and negligent, but not within the above clause.<sup>43</sup> A locomotive engineer was killed in attempting, while his train was in motion at a moderate speed, to cross from his engine into the next car, to draw the brakes. It was held that he was not guilty of voluntary exposure to unnecessary danger.<sup>44</sup>

10. Where a person unconsciously runs into danger, he cannot be said to voluntarily expose himself to the same.

<sup>39</sup> 171 Pa. 1, 10 (1895).

<sup>40</sup> 134 Mass. 175 (1883).

<sup>41</sup> 92 Tenn. 167 (1893).

<sup>42</sup> 114 Ill. 533, 539 (1895).

<sup>43</sup> 24 Wis. 28, 33 (1869).

<sup>44</sup> 32 Md. 310 (1869).

So, if, while traveling on a train, the insured fall asleep, and when it is quite dark and he is in a dazed condition, not realizing or knowing what he is doing, he unconsciously rises from his seat and walks to the platform of the car, falls to the ground and is injured, it is not a voluntary exposure to unnecessary danger, within the meaning of the policy. Besides, where the danger is hidden, an exposure to the same cannot be considered as voluntary within the meaning of the policy. A clear distinction exists between a voluntary act and voluntary exposure to danger. Hidden danger may exist, yet the exposure thereto without the knowledge of the danger does not constitute a voluntary exposure to the danger. The act may be voluntary, yet the exposure involuntary. For example, the train on which the insured was traveling stopped on a bridge, several passengers alighted on the bridge, and the insured, while attempting to do the same, fell through an uncovered hole of the bridge and received injuries from which he died. It was held that this was not a voluntary exposure to unnecessary danger, as the danger was hidden and was not anticipated by any one. The act of stepping from the car was voluntary, but as there was no visible danger, it cannot be considered as a voluntary exposure to unnecessary danger.<sup>45</sup>

To constitute voluntary exposure, the accident must happen from the danger which could be reasonably anticipated from the exposure. If a person while walking upon a railroad track be assaulted by a robber or struck by lightning, the act of walking upon the track has no tendency to produce either of these injuries. He cannot, therefore, be regarded as exposing himself to these dangers by walking upon the railroad track. If, however, he be struck by a train and be run over, the precise injury happens which there is reason to fear would happen.<sup>46</sup> If the policy forbid the insured from being on railroad beds and railroad bridges, and, in alighting from a train which had stopped on a bridge, he fall through an uncovered hole and be killed,

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<sup>45</sup> 102 Pa. 262 (1883).

<sup>46</sup> 134 Mass. 175 (1883).



there is no violation of the clause in the policy. The purpose of the clause is to guard the insured from being run over by a train, and not from injuries that might result from any defect in the bridge.<sup>47</sup>

11. In order to violate the provision of the policy, there must be an exposure to an unnecessary danger. To jump from a moving car when there is imminent danger of collision, or in the case of fire, would not be a voluntary exposure to danger in this sense.<sup>48</sup> Moreover, to brave danger, to rescue others who are in great peril, as the inmates of a burning house, or to save the lives of those on a wrecked vessel, will not avoid the policy, in case of injury or death happening to the insured while doing this act. It is one's duty as a citizen to rescue those in distress.<sup>49</sup> Besides, where a person with the knowledge of the company engaged in an occupation in which he must, as an incident to his business, incur certain dangers, he will not be precluded from recovering if injury or death come to him while incurring such dangers, notwithstanding the provision of the policy against exposure to unnecessary danger. The most common example of this class of cases is that of employes of railroads, such as conductors and brakemen, who, as an incident to their business, are obliged to alight from or board trains while in motion. The conductor of a passenger train whose death results while attempting to board a moving train can recover, even though the policy contain a clause that the company shall not be liable for death or injury caused by getting on or alighting from trains while in motion. It is a matter of common knowledge that these persons have, as a part of their business, to do this very thing, and the company must have known this when they insured the conductor.<sup>50</sup>

12. **Obvious Risks.**—Some policies provide that the insured cannot recover where the injury or death is the result of exposure by the insured to an obvious risk.

<sup>47</sup> 102 Pa. 262 (1883).

<sup>48</sup> 171 Pa. 1, 10 (1895).

<sup>49</sup> 50 Hun (N. Y.) 50 (1888).

<sup>50</sup> 57 N. W. Rep. 184 (1894).

Exposure to an obvious risk is essentially the same as a voluntary exposure to an unnecessary danger.<sup>51</sup> Exposure to an obvious risk may be (1) to a risk which was perfectly obvious to the insured at the time he exposed himself,<sup>52</sup> or (2) a risk which should have been obvious to him at the time if he were paying reasonable attention to what he was doing.<sup>53</sup> That is to say, it is not enough to state that the danger must be actually seen by the insured; it is enough if the danger were present and ought to be seen by a man of ordinary sense and prudence. Thus, where the insured met his death while attempting, in broad daylight, to cross the main line of a railroad in front of an approaching train, he cannot recover, as he had exposed himself to an obvious risk within the meaning of the policy.<sup>54</sup> To walk along a railroad track on a dark, rainy night, at a time when the insured knew that trains were frequently passing in both directions, also constitutes an obvious risk, for which, under the terms of the policy, there can be no recovery for injury or death.<sup>55</sup>

**13. Occupation.**—Accident-insurance companies seek to limit their liability in various ways. Thus, their policies limit the liability of the company only to accidents which happen in the course of the employment of the insured, which is described in the policy. Where such clause is contained in the policy, the insured cannot recover for any injury which is caused through any accident which cannot be said to have occurred in the course of such employment of the insured; as where the employment of the insured is described in the policy to be that of a retired gentleman, and he is injured while operating a buzz saw for his amusement. The injury in such case is one that occurs not in the course of the insured's vocation as a retired gentleman, within the meaning of the policy, and there can be no recovery.<sup>56</sup>

Occupation, however, has reference to the vocation, profession, or calling in which the insured engages for his profit, and does not preclude him from the performance of

<sup>51</sup> 171 Pa. 1 (1895).

<sup>52</sup> L. R. 23 Q. B. Div. (Eng.) 453, 456 (1889).

<sup>53</sup> 3 Ins. L. J. 877 (1874).

<sup>54</sup> L. R. 23 Q. B. Div. (Eng.) 453 (1889).

<sup>55</sup> 3 Ins. L. J. 877 (1874).

<sup>56</sup> 6 N. Y. Supp. 57 (1889).

acts and duties which are simply incidents connected with the daily life of men in any occupation. Therefore, if a merchant be accidentally killed while hunting as a recreation, it is considered that the act of hunting does not constitute the occupation of hunting. There being no change in occupation, the terms of the policy were not violated, and there can be a recovery on it; nor is the occupation of an earthenware manufacturer changed if he pitch hay while on a visit to a farmer, and be injured in the act; nor does a teacher become a builder by constructing a bridge on his own land, in which employment he is injured.<sup>57</sup> A person who represents that he is engaged in a particular employment does not warrant to the insurer, when taking out a policy, that he will not change his occupation. It follows, where the policy does not state that it covers injuries received only through accident occurring in the course of the occupation of the insured, that the company cannot defend payment on the policy, if the accident happen while the insured is engaged in another employment than the one in which he was employed when the policy was taken out. Thus, where the insured is a switchman and is fatally injured while performing the duties of a brakeman, the policy being silent on the matter of the change of occupation, he can recover.<sup>58</sup>

14. One of the most usual of this class of provisions is that if the insured be injured or killed while engaged in an occupation classified by the company as more hazardous than the one by which he was designated in the policy, he shall recover only such indemnity as the company pays for the risk of the more hazardous class. In other words, accident-insurance companies have classified the risks according to the employment of the insured, and specified in the policy that they will pay certain indemnities for injuries or death, as the case may be, to the insured, differing in amount according to his employment, the larger sums being paid to those who are engaged in the less hazardous occupation.

<sup>57</sup> *Am. & Eng. Encyc. Law* (2d Ed.), Vol. 1, p. 303, citing 42 Ill. App. 97 (1891); 134 Ill. 228 (1890); 69 Pa. 43 (1871); 34 N. J. Law 371 (1871).

<sup>58</sup> 49 Ill. 180 (1868).

Thus, a merchant is placed in the most favored class, a conductor in the less favored class, as his employment is obviously the more dangerous, and a miner in the most hazardous class. Moreover, some insurance policies and certificates of mutual-benefit societies provide that there can be no recovery if, at the time the injury was received, the insured were engaged in an employment, either more hazardous in itself, or classified by the company as more hazardous.<sup>59</sup> Where questions have come before the courts for a construction of these provisions, it has invariably been held that a person insured under the claim of a particular vocation does not create a change of occupation, within the meaning of these provisions, by temporarily engaging in something more hazardous than his regular employment, when the temporary employment is such as we have before illustrated in the cases of the merchant who was killed while hunting, the earthenware manufacturer who was injured while pitching hay, and the teacher who was injured while constructing a bridge on his own land. The language of the provisions in company policies and benefit-society certificates has respect to *employments*—not to individual acts. The terms of the provisions, literally rendered, require that the insured, to come within their effect, must, at the time of the injury, be in an employment more dangerous than his own—the one he claimed to be engaged in at the time he was insured, and under which the nature of his risk is classified.<sup>60</sup> As an exemplification of an actual and permanent change of employment which would operate to increase the hazard, it is not necessary to resort to decided cases, of which there are many. The imagination can easily provide a good illustration in point, as, for instance, if the insured were the superintendent of a cotton mill at the time of receiving his policy, and became the inside superintendent of a mine, in which employment he received his injury. The increased hazard of the latter employment is obviously one which every insurer can successfully defend against.

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<sup>59</sup> 34 N. J. Law 371 (1871).

<sup>60</sup> *Ibid.*

Some policies and certificates forbid the insured from being engaged in certain especially hazardous employments, such as mining, blasting, or wrecking, except when such occupations are stated in the application and permitted. Where the insured, who was a farmer residing on the banks of a great lake, took part in saving a crew of a grounded schooner and was drowned, it was held that the insured was not employed in wrecking within the meaning of the provisions of the policy, nor had he exposed himself to unnecessary danger, which the policy also prohibited, but that his act of assisting in aiding the rescue of the crew was a commendable performance of duty. As well might a farmer who should be smothered in attempting to rescue his neighbors from their burning dwelling be called a fireman as this man a wrecker.<sup>61</sup>

**15. Injuries to Travelers.**—Limitations in accident policies to injuries caused by accident while traveling in public or private conveyances for the transportation of passengers are common. It is clear that if one, insured under a policy containing such a provision, be injured in any other manner, he cannot recover. For example, if the insured be killed by falling from a hay loft, the insurer's defense in an action by insured's beneficiary prevents recovery on the ground of limitations of liability to injuries received while traveling, as mentioned.<sup>62</sup>

It frequently becomes necessary to determine when the insured can be said to be actually traveling within the meaning of the policy. If one be injured while getting on or off the vehicle of transportation, the injury is within the meaning of the policy. Both of these acts—the act of getting on the vehicle before one starts on his journey and the act of getting off the vehicle when at the journey's end—are intimately connected with the journey and form a necessary part of it.<sup>63</sup> So, where the insured while walking from a steamboat landing to a railroad station, in the course of his journey, is injured by slipping on the sidewalk, he is held to

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<sup>61</sup> 50 Hun (N. Y.) 50, 54 (1888).

<sup>62</sup> 136 Ind. 672 (1893).

<sup>63</sup> 10 Exch. (Eng.) 45 (1894).



be traveling within the meaning of the policy, because it is well known to both parties to the contract that in traveling it is necessary to change cars or other vehicles, and in doing so it is often necessary to leave the conveyance and walk for a certain distance before taking another vehicle, and, therefore, the journey is still being prosecuted when the insured is hurt, in the manner mentioned.<sup>64</sup> Where, however, the insured has reached the end of his journey, but, before he can reach his home, he has to walk a certain distance, he cannot be said to be traveling by public or private conveyance while he is walking home. Consequently, if he be injured while so walking, he is not within the terms of the policy containing the clause under discussion, and cannot recover;<sup>65</sup> nor can there be a recovery where the insured has finished his journey for the day, intending to continue to travel the next day, and is injured while engaged in doing something which has no connection with his journey, as in speaking with the engineer of the train about his friends. Such injury is not a happening while traveling by private or public conveyance within the meaning of the policy.<sup>66</sup> Some of the policies of this character provide further that the insured must comply with the rules and regulations of the carrier by whom he is being conveyed. This clause is given a reasonable interpretation, and by it is meant, not that the insured must acquaint himself with all the rules of the railway or steamboat company in whose cars or boats he is traveling, however minute and unimportant they be, but that he must acquaint himself with those general rules as to the management of trains and boats and the conduct of railroads and boat lines which are presumed to be known by travelers. The same is true of travelers by other means of conveyance. Where the insured is injured by being thrown from the steps of a car where he was standing while the train was approaching a station, in violation of a rule of the railroad company known to the insured, he cannot recover under an accident policy which provides that the insured must

<sup>64</sup> 43 N. Y. 516 (1871).

<sup>65</sup> 11 Wall. (U. S.) 336 (1872).

<sup>66</sup> 62 Fed. Rep. 893 (1894).

comply with the rules and regulations of the carrier.<sup>67</sup> Persons may be on the platform rightfully, as to pass from one car to another, but to stand on a platform or on the steps while the train is approaching a station is a plain violation of the rule, and there can be no recovery under a policy containing a clause such as we have just described, if injury result to the insured thereby.<sup>68</sup>

**16.** Where carriers have certain rules, which are so generally disregarded that they can hardly be said to have any efficacy, a breaking of those rules by the insured will not avoid the policy. Thus, where a railroad company has a rule forbidding passengers to ride on platforms of the cars, but, nevertheless, permits passengers to ride thereon, and often by the invitation of the trainmen, a breach of such rule of the railroad by the insured, who received fatal injuries by being on the platform of a moving train, will not avoid the policy.<sup>69</sup> Sometimes the policy itself provides that the insured shall not do certain things while traveling, such as boarding or alighting from moving trains, or standing on the platforms of moving cars. Usually employees of railroads, while in the performance of their duties, are excepted from such provision of the policy. But, where an employee of a railroad violates the provisions, when acting wholly outside of his duties in connection with his employment, this clause of the policy applies to him and he cannot recover. If a shop hand of a railroad company, while being carried home at the end of his day's work, be thrown from the platform of a car, where he stood while the train was in motion purely for his own convenience, there can be no recovery, for it is held that he violated the clause of the policy.<sup>70</sup>

**17. Permanent or Total Disability.**—As before stated, there are two plans on which accident insurance is carried: (1) The company agrees to pay a certain fixed sum for certain permanent disabilities, and (2) a weekly indemnity for disabilities which are temporary in their nature.

<sup>67</sup> 8 Biss. (U. S.) 399, 402 (1873).

<sup>68</sup> 56 Iowa 664 (1881); 41 Minn. 231 (1889).

<sup>69</sup> 39 Fed. Rep. 321 (1889).

<sup>70</sup> 41 Minn. 231 (1889).

Occasionally, by the provisions, especially in mutual-benefit societies, a certain weekly indemnity is to be paid for permanent disability of such nature as to deprive the insured of the ability to earn a livelihood at any kind of business. There are certain questions that are common to both kinds of disability. Some policies provide that in order to recover for the disability, the injury should immediately disable the insured. The meaning of the word *immediately* has been the subject of interpretation. As used here the term has reference to the time within which, after the injury, the disability begins. The reason for the provision is to make sure that the injury caused the incapacity, not some intervening disease; for where a person becomes disabled thirty days after the injury, he is not within such provision of the policy and cannot recover. Thirty days cannot be interpreted as immediately.<sup>71</sup> Nor should the term be given the meaning of instantaneously, but, it may be, and generally is, construed to mean a reasonable time after injury, as three, four, or five days.<sup>72</sup>

*Permanent*, or *total*, *disability*, as employed in the provisions of accident policies, depends largely upon the occupation and employment in which the person insured is engaged. The term is a relative one. It can be readily understood how a person who labors with his hands would be totally disabled only when he cannot labor at all. But the same rule would not apply to the case of a professional man whose duties require the activity of the brain, which is not necessarily impaired by serious physical injury. If a person engaged in general practice of medicine or surgery be unable to go about his business, enter his office, and make calls upon any of his patients, but be confined to his bed, and can only exercise his mind on occasional applications to him for advice, he may be said to be totally disabled within the meaning of the provisions of the policy. Where the insured is able occasionally to perform some trivial unimportant duty in connection with his occupation, this will not render his

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<sup>71</sup> 91 Ga. 698 (1892).

<sup>72</sup> 185 Pa. 90 (1898); 60 Ill. App. 106 (1894).

disability partial instead of total. The frequency and the nature of such act, however, will materially aid in determining whether the disability were partial only or total.<sup>73</sup>

A disability that simply prevents the insured from doing as much in a day's work as before is not total, but one that prevents him from doing certain portions of his accustomed work is total, although there are other portions that he is able to perform. It was so held in a case where a farmer was allowed to recover as for a total disability, because he was unable to do the ordinary and customary work on the farm, although he was able to milk, and do some light work in the barn. Where the insured was solicitor and registrar of a county court, and sprained his ankle, which confined him in bed for several weeks, a recovery was allowed on the same grounds; also, where an iceman, who was also proprietor of the business, occasionally helped in delivering ice, and was injured while thus engaged, it was held to be a case of total disability.<sup>74</sup>

18. Provision is made in most accident policies issued by regular companies that a certain sum shall be paid for the loss of certain members of the body, as a foot, hand, or an eye. In order to recover under this clause it is not necessary that there be a physical severance of such members from the body, as, for instance, the amputation of a hand or foot. The loss of a hand or foot means the actual and entire loss of the use of such member of the body. If the member can perform no function whatever, then it is lost as a hand or foot. Where, by an accidental injury to the spine of the insured, total paralysis of the lower part of the body set in, whereby the insured was deprived of the use of both of his legs, he can recover under the policy for the loss of two entire feet.<sup>75</sup> Where, however, the insured can by an artificial appliance use his injured member with little or no hindrance, he cannot recover for the loss of such member. Surely,

<sup>73</sup> 55 Hun (N. Y.) 98, 100 (1889); 69 Minn. 14 (1897).

<sup>74</sup> Am. & Eng. Encyc. Law (2d Ed.), Vol. 1, p. 296, citing 8 Am. L. Reg. N. S. 233 (1869); 5 H. & N. (Eng.) 546 (1860); 28 N. Y. St. Rep. 55 (1889).

<sup>75</sup> 77 Wis. 618 (1890).

where the insured has a leg amputated and by means of an artificial leg he is able to go about, he has literally lost a leg within the terms of the policy and can recover, notwithstanding the fact that he can use a leg; but, where his spine is injured so that he is deprived of the use of one or both of his legs, but by the use of an artificial appliance, called a plaster jacket, he can be about without any material hindrance, then he has not suffered the loss of his legs within the meaning of the policy.<sup>76</sup> But this rule of law would not apply where the use of the appliance would endanger the life of the insured or subject him to intolerable discomfort. Where such is the case, the disability would be none the less permanent, even though by the use of such an appliance the insured could be about.<sup>77</sup>

Where the policy provides for certain indemnity in case of total and permanent loss of the sight of both eyes, and the insured had only one eye at the issuing of the policy, and the company has knowledge of the fact, he can recover under the above provision in case he lost the sight of his remaining eye after the policy was issued. The loss of one eye to him is practically the same as the loss of both eyes to an ordinary man. It is total blindness in either case.<sup>78</sup> Ordinarily, the loss of the fingers of one hand does not hinder the insured permanently, and totally incapacitate him from engaging in or directing any business or employment. Where a stone mason was injured so that he lost the four fingers of his right hand, he could not recover under a total disability provision.<sup>79</sup>

Where the policy provides for indemnity in case the insured is not able to follow *any* occupation after injury, he must prove that he is disabled from following any occupation. It is not enough to show that he has been rendered incapable of following the occupation in which he was engaged. Where the insured, a barber, is rendered incapable of working at his trade, but is able to follow some other business, as that of a clerk, he cannot recover as for a permanent and total inability to follow any occupation whereby he may obtain a livelihood.<sup>80</sup>

<sup>76</sup> 150 Pa. 132 (1892).

<sup>77</sup> 54 Mo. App. 468 (1898).

<sup>78</sup> 139 Pa. 264 (1898).

<sup>79</sup> 79 Ill. App. 145 (1898).

<sup>80</sup> 34 Fed. Rep. 721 (1887).



## INDEMNITY INSURANCE

**19. Definition and Kinds.**—Indemnity insurance is a contract by which a person is insured against liability to other persons for claims for compensation on account of accidental personal injuries to such other persons, for which injuries the person insured is legally liable.<sup>1</sup> The most usual example is what is called *employers' liability insurance*, by which an employer is insured against claims for accidental personal injuries to his employes, for which he may be legally liable in his capacity of employer. There are also general liability policies that insure against claims for personal injuries to others than employes for which the insured may be legally responsible; such as *elevator policies*, or the elevator clause attached to general liability policies insuring claims for injuries caused to persons by the elevator of the insured; *horse and vehicle policies*, by which the owner is insured against personal injuries to others than the employes of the insured, caused by any horse, team, or vehicle of the insured, if engaged in his business and in charge of his employes; also, *boiler insurance*, by which the owner of a boiler is insured against injuries caused to the employes or to strangers from the explosion of a boiler, provided the explosion be not the result of a fire.<sup>2</sup> There are also other liability policies, which are issued to builders and contractors and insure against the claim for compensation for personal injuries to workmen employed by other contractors, or to the public caused by the workmen of the insured.<sup>3</sup>

By these several kinds of policies the company undertakes to pay a certain limited amount to any one person and another limited amount to several persons for any one casualty. The typical policy provides that if any legal

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<sup>1</sup> 155 Mass. 404, 407 (1892).

<sup>2</sup> 155 Mass. 404, 407 (1892).

<sup>3</sup> 57 Fed. Rep. 294 (1892).

proceedings be instituted against the insured by any injured person to enforce the claim for compensation for such injury, the insurer shall, at its own expense, defend the case in the name and on behalf of the insured, unless it shall offer to pay the insured the full amount of insurance, payable for any one injury, when it shall not be bound to defend the suit or be liable for costs which the insured might incur by defending the suit.<sup>4</sup>

**20. Nature of the Contract.**—The recent flood of actions for personal injuries has greatly facilitated the development of indemnity insurance. Men engaged in business, managers, or lessees of business properties, began to understand that the danger of exposure to heavy losses from accidents to the persons of others was so great that no prudent man could afford to take the chances.<sup>5</sup> It is evident that an insurable interest must exist in these policies, as in the other kind of insurance, to render the contract valid. The insured has such an interest in the safety of those whose accidental personal injuries are made the foundation of his claim to indemnity. The happening of such an accident will be of disadvantage to the insured and will subject him to direct pecuniary loss, for which such policies afford him a useful and desirable means of indemnity.<sup>6</sup>

In all the cases of indemnity insurance, it is an accidental personal injury to one, other than the insured, that causes the right to the insurance money to spring up. The indemnity paid is always for the loss caused to the insured by an accident for the effect of which he is legally responsible and which results in either bodily injury or death; that is to say, the accidental injury which forms the basis of the claim for insurance must be one for which the insured is legally liable, and one covered by the policy.<sup>7</sup> Such insurance is perfectly valid and not against public policy. Thus, it has been declared that insurance by a common carrier from liability for injuries to passengers, caused by its negligence, is not

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<sup>4</sup> 41 S. W. Rep. 420 (1897).

<sup>5</sup> 155 Mass. 404, 408 (1892).

<sup>6</sup> 155 Mass. 404, 408 (1892).

<sup>7</sup> *Ibid.*

in any sense against the policy of the law. Such insurance does not in any degree diminish the responsibility of the insured to the injured party, but it increases his means of meeting that responsibility. Nor does it in any sense relax the diligence and care of the insured. His insurance is usually so limited in the amount to be paid for each accident that he may at any time be compelled to suffer a part of the loss himself.<sup>8</sup>

**21.** This contract of insurance is not simply a contract of indemnity; it is a contract to pay liabilities. The difference between a contract of indemnity and a contract to pay liabilities is that upon the former no valid claim for the insurance money can be maintained until the insured has fully discharged his liability by paying for the same. Upon the latter the claim is complete when the liability is incurred; that is to say, the contract is an indemnity against liability, so that it is not necessary that the insured shall have paid for the injury before he can maintain a claim on the policy. The measure of the liability on the policy is the amount which is legally ascertained to be due from the insured to the injured person, provided, that such sum be not greater than the amount which the insurer has agreed to pay for such injury. If the sum be greater, the insurer will be liable to the insured in the maximum sum named in the policy as payable for such injury.<sup>9</sup>

A final judgment recovered by the injured party against the insured fixes the legal liability for which, under his contract with the insurance company, he is entitled to recover. Any other final determination of the damages to be paid by the insured to the injured party will serve equally well in fixing the amount for which the company is liable under the policy. On the contrary, a judgment which has been appealed from cannot be considered as determining the liability of the company under the policy.<sup>10</sup> The recovery of a judgment by the injured party is not the injury insured against, but the

<sup>8</sup> 82 Md. 535 (1896); 151 Mo. 373 (1899).

<sup>9</sup> 36 N. W. Rep. 1,051 (1896); 93 Wis. 201 (1896).

<sup>10</sup> 36 N. W. Rep. 1,051 (1896); 41 N. W. Rep. 420 (1897).

liability in consequence of an accident. The recovery of a judgment is a mere test or measure of proof. In other words, the liability of the company to reimburse the insured under the policy becomes a fixed liability the moment an event happens which fastens a responsibility on the insured, if that event be within the terms of the policy; but the amount of the liability is determined when in some manner the sum which the insured must pay to the injured party is ascertained. If, therefore, the insurance company become insolvent and, prior to such insolvency, an accident have occurred rendering the insured liable and entitling him to compensation within the terms of the policy from the insurance company, he has a valid claim against the funds of such company even though the claim against him have not been reduced to a judgment, or otherwise definitely fixed in amount. The court in such a case will fix a period of time within which such claims for injuries against the insured shall be determined in amount, in order to enable the insured to participate in the funds of the insolvent company.<sup>11</sup>

22. The basis of the claim for indemnity insurance is the injury to some person other than the insured for which he is legally liable. While this is true, it is evident that the injured person can have no claim under the policy against the insurance company. This question has arisen in the case of employers' liability insurance. It is clear that the contract is not made by the employe, nor for his benefit. Thus, an employe of one who took out an employers' liability insurance policy was injured while at his work, and died as a result of the injury. The insurance company paid to the employer the amount due on the policy for such accident, and it was held that this sum constituted in no sense any assets of the deceased employe nor did it belong to his legal representatives.<sup>12</sup> Where such a policy is taken out by an employer, and by its terms is payable to the insured for the benefit of the injured employe or their legal representatives, in case of death, and a claim by the legal

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<sup>11</sup> 56 N. J. Eq. 41 (1897); 82 Md. 585, 572 (1896).

<sup>12</sup> 95 Ga. 192 (1894).

representatives of an injured employe who has died, is paid by the employer of the deceased, no more rights can exist in their favor under the policy.<sup>13</sup> The injured person has this right against the insurance company, that when he has recovered judgment against the insured for the injuries, and, for any reason, he cannot compel the insured to pay in satisfaction of the judgment, he can enforce the rights of the insured under the policy for his benefit. And, in case the insured has become bankrupt, the sum due from the insurance company, under such state of facts, does not belong to the creditors of the insured but to the injured party.<sup>14</sup>

**23. Character of the Injury.**—The injury forming the basis of the claim must be an accidental injury, and is usually limited to personal injuries as opposed to injury to property. The injury must be the result of an accident.<sup>15</sup> Thus, a boiler insurance policy which indemnified the insured against loss through explosion of boilers, provided that the company should not be liable under the policy if the explosion resulted from fire. It was held that where a fire started on the premises, and in the course of its progress some dust was ignited which caused the explosion, resulting in personal injury to employes of the insured, there could be no recovery from the company under the policy.<sup>16</sup>

Employers' liability insurance necessarily covers injuries while the one injured is engaged in the business of the employer, which business is described in the policy. Sometimes other kinds of indemnity insurance are confined to injuries resulting from a certain business of the insured. It is therefore necessary to determine when the injury was the result of carrying on such business. An injury happening in the course of constructing a new building for carrying on the business of the insured cannot be construed to be an injury in the course of the business of the insured.<sup>17</sup> Where a policy, covering injuries occurring to the employes of an insured employer engaged in iron and steel manufacturing,

<sup>13</sup> 158 N. Y. 431 (1899).

<sup>14</sup> 98 Wis. 201 (1896); 47 Atl. Rep. 579 (1900).

<sup>15</sup> 155 Mass. 404 (1892).

<sup>16</sup> 57 Fed. Rep. 294 (1892).

<sup>17</sup> 161 Mass. 122 (1894).



by its terms covers "all operations connected with the business of iron and steel works," and an employe was injured during the process of constructing an addition to the works, it is an injury within the terms of the policy. If the insurance company desired to restrict the operation of the policy only to injuries received in any particular branch of the business, it should have done so in the policy.<sup>18</sup> Any unforeseen accidental injury which happens to an employe while engaged in the ordinary work of the employer is covered by the policy. Therefore, where an employe in a gun factory was injured while in the act of cleaning a shell which was believed to be spent, such injury is covered by the policy. But under a policy which insures a street-railway company against liability for injuries from horses, cars, and the like, used in the business of the insured, and described in the policy, where several persons were injured by the overturning of an omnibus sleigh which the insured was obliged to use in the place of a car while the track was obstructed by snow and ice, it was held that the insurance company was not liable under the policy for such a loss, because it did not occur in the business described in the policy.<sup>19</sup> And where the policy insures an employer from liability for injuries to his employes created by a certain statute, and the insured is made liable for injuries to an employe not within the statute, this is not a loss within the terms of the policy.<sup>20</sup>

24. Where the insured is obliged to defend a suit, it seems he can recover from the insurance company, besides the amount he was obliged to pay to the injured person, a reasonable attorney's fee and costs of conducting the suit, especially where by the terms of the policy the duty of defending suits brought against the insured for injuries within the policy devolves upon the insurance company, and it fails to perform the same.<sup>21</sup> But where, by the terms of the policy, the duty of defending such suit rests upon the insured, and the liability of the insurance company is to be determined by the results of such suit, the costs of

<sup>18</sup> 93 Wis. 201 (1896).

<sup>19</sup> 160 Pa. 630 (1894).

<sup>20</sup> 16 Sc. Sess. Cas. (4th Ser.) 212 (1888).

<sup>21</sup> 56 N. J. Eq. 41 (1897).

such suit are no part of the loss insured against, and, consequently, the company is not liable for the same.<sup>22</sup> Unless the policy provide to the contrary, the negligence of the insured in causing the injury is no defense which would prevent a recovery on the policy. Except for such negligence, there would usually be no liability on the part of the insured, and, therefore, no risk requiring any insurance. The policy sometimes provides, however, that the insured must exercise a certain degree of care, as, for example, to comply with the factory laws in his establishment.<sup>23</sup> Thus, an insurer is not liable to reimburse the insured for damages recovered for injuries sustained by a child under twelve years of age, employed in violation of a statute.<sup>24</sup>

**25. Notice of Injury.**—In common with other policies, employers' liability policies make certain provisions with reference to notice being given to the company on the happening of an event for which it is liable. The usual provision is that the insured shall give written notice to the company, either immediately after the happening of an accident or within a certain number of days thereafter.<sup>25</sup> This condition of the policy is essential and must be fulfilled; a failure to give notice within the required number of days will bar a recovery on the policy. Notice given twenty-six days after the accident occurred is not immediate notice within the terms of the policy. A failure to give notice sooner because the insured had business troubles which caused him for a time to forget about the notice is no excuse for non-compliance with this condition of the policy.<sup>26</sup>

The time when notice should be given is very important. Where the policy provides that the insured shall, immediately on the occurrence of an accident, notify the company thereof of any claims for damages, it is incumbent on the insured to notify the company after the accident has occurred, and he cannot wait with his notice till after a claim is presented to him. The company under the policy is entitled to have

<sup>22</sup> 57 N. Y. Supp. 1,100 (1896).

<sup>23</sup> 89 Fed. Rep. 131 (1898).

<sup>24</sup> 64 N. W. Rep. 164 (1900).

<sup>25</sup> 75 N. W. Rep. 996 (1898).

<sup>26</sup> 171 Mass. 357 (1898).

notice immediately after the accident has happened. Therefore, where the insured did not give notice to the company till nine months after the accident occurred, he has not complied with the provision of the policy, even though the notice were given immediately after a claim for injuries as a result of such accident was presented to him. Where a policy provided that upon the occurrence of an accident and upon notice of any claim against the insured on account of the accident, immediate notice in writing should be given to the company, it was decided that the company was entitled to notice only after the insured had knowledge of any claim against him by reason of an accident. Thus, where an accident occurs and a person is injured, but no claim is made against the insured by the injured person till six months after the occurrence of the accident, notice given by the insured to the company, immediately upon receiving the claim of the injured person, is a compliance with this provision of the policy.<sup>27</sup>

**26. Defense and Settlement of Suits.** — As previously stated, one of the features of the policy is the provision usually present that the insurance company undertakes to defend all suits that may be brought against the insured for injuries for which, under the policy, the company must compensate the insured. It is further provided that the company shall have full right to settle all such claims, and that the insured shall not, without the consent of the company, settle any such claims, except at his own cost. If, under such a policy, the company be notified of the claim and that a suit was brought on it, and it refuse or neglect to defend the suit, it is bound by the judgment recovered in such a suit and is liable to pay the same with costs, to the limit for which it is liable on the policy.<sup>28</sup> Certainly, where the company is not liable on the policy for the injury on which suit is brought, it is not liable to defend the suit on behalf of the insured, but where it has undertaken to defend a suit brought against the insured by the person injured, and has

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<sup>27</sup> 63 Minn. 286 (1895); 111 Mich. 148 (1896).

<sup>28</sup> 151 Mo. 373 (1899).

conducted the defense till the eve of the trial, when it dropped the case, not giving the insured an opportunity to prepare the defense in the suit, which he consequently lost, the company cannot claim that, according to the result of that suit, the insured has violated some provision of the policy and so cannot recover. It was in duty bound to continue the defense and thus possibly show that the insured was not at all liable for the injury.<sup>29</sup>

An agreement between the injured party and the insured, pending a suit for injuries, that the amount recovered in excess of the policy shall be settled for a certain amount, is not such a settling of the claim for damages by the insured as to constitute a breach of the condition of the policy with reference to settling claims without the consent of the company; for, a settlement of a judgment recovered by the employe was not forbidden by the policy.<sup>30</sup>

Where the company could have settled the claim for a comparatively small amount, but has refused to do so, and defends the suit instead, and the injured person recovers more than the limit for which the company is, under the policy, liable to pay, it is nevertheless liable to the insured for no more than the sum limited in the policy and the costs of the suit against the insured.<sup>31</sup>

**27. Limitation of Liability.** — The policy usually provides that all claims thereunder shall be void unless the insured prosecute his claim within a certain time from the date of the loss. In such a case, the insured has the specified period of time for the prosecution of his claim after a final order or judgment from the court compelling him to pay for the injuries. If a policy provide that no suit or proceedings shall be brought to recover a claim under the policy unless commenced within three years from the date of the accident, and, if a suit, instituted by a third person against the insured for personal injuries, be pending at the termination of the said period of three years, a suit may be brought against the company within six months from the termination

<sup>29</sup> 162 N. Y. 399 (1900).

<sup>30</sup> 38 S. E. Rep. 160 (1901).

<sup>31</sup> 92 Me. 574 (1899).

of the said suit. In such a case, the suit against the insured is, for the purpose of this provision in the policy, terminated when a final judgment is given by the court, and the insured must bring his action against the company six months thereafter, or his claim will be barred.<sup>32</sup>

Several insurance companies insured one person against injuries, and in each policy there was a provision that suit should not be brought against more than one of the companies at one time, the other companies agreeing to abide by the event of such suit. In such a case, a provision that the insured shall bring suit on the policy within three years from the time the accident occurs was held to mean that, when action against one of the insurance companies is brought within the three years, the limitation in favor of the other insurance companies stops running until the suit against the first company is terminated.<sup>33</sup>

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## FIDELITY INSURANCE

**28. Nature of the Contract.**—Fidelity insurance relates more particularly to guaranteeing against loss by reason of a breach of contract.<sup>1</sup> The most usual example of this kind of insurance is that which guarantees the employer against the infidelity or dishonesty of employes. The term *guaranty* is sometimes used to express indiscriminately the classes of insurance known as credit, fidelity, and title insurance, but these latter designations are better adapted to the subject-matter, and their separate employment is the better usage. The expression *guaranty insurance* has extended use in England and Canada, where it is employed to designate insurance of the integrity of employes, the phrase *policy by guaranty* being in frequent use by the courts.<sup>2</sup> The one whose fidelity is insured is often called the principal, and the person insured is the obligee. The policy is usually called a bond, in analogy with bonds given by private sureties.

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<sup>32</sup> 89 Hun (N. Y.) 456 (1895).

<sup>33</sup> 6 N. Y. App. Div. 540 (1896).<sup>2</sup>

<sup>1</sup> 78 N. W. Rep. 1,051-1,052 (1899).

<sup>2</sup> Bouv. Law Dict.



The contract guaranteeing the honesty of employes is perfectly valid in the law and is not against public policy. The same principle in law is involved in every bond exacted from a public officer or a private agent as security for the faithful performance of his duties.<sup>3</sup> Examples of fidelity or guaranty insurance are as follows: A policy of insurance guaranteeing the payment of a note on a day certain; one guaranteeing the payment of the principal of certain debentures, or corporate securities, within three months from the date when they become due and payable. Besides, policies have been issued to an owner guaranteeing the completion of a structure by the contractor, or insuring the landlord against loss of rent.<sup>4</sup>

**29.** The general rule in this, as in other kinds of insurance, is that if the bond be fairly and reasonably susceptible of two constructions, one favorable to the insured, and the other to the company, the former, if consistent with the object for which the bond was given, will be adopted.<sup>5</sup> The doctrine that the contract of insurance is avoided by concealments or misrepresentations of material facts on the part of the insured applies as well to this kind of insurance as to any other. All material disclosures of the circumstances of the risk are vital, and a failure in this respect avoids the policy. But the company and the insured in a fidelity-insurance bond are on a plane of equal opportunity to secure information; therefore, the insured is not held so strictly to the duty of disclosing all the circumstances of the risk, as in the case of ordinary insurance, such as life and property insurance. Thus, the insured is not bound to disclose any circumstances which have no connection with the employment of the insured, but which may throw light on the character of the employe.<sup>6</sup> Where the directors of a bank, upon learning that the cashier was engaged in gambling, required him to give them a bond insuring them against loss, the mere fact that they did not state to the company insuring

<sup>3</sup> 63 Minn. 170 (1895).

<sup>4</sup> 185 Pa. 217 (1898); 177 Pa. 262 (1896).

<sup>5</sup> 170 U. S. 133 (1898).

<sup>6</sup> 80 Fed. Rep. 766 (1896).

them, when not inquired into, about his gambling, will not avoid the policy. If, however, such an employe have made default, and the employer, concealing that fact, attempt to secure himself against loss by taking out a policy against his dishonesty or fraud, without imparting his knowledge of the employe's defaults to the company, he could not recover on the policy, as he was bound to disclose to the company the circumstances of the risk which had to do with the very employment which the company secured. A failure, therefore, to disclose them is a fraud on the company.<sup>7</sup>

30. Answers made by the insured in an application for a policy, unless it be otherwise provided in the bond, are to be treated as representations, and the insured will be held to the substantial truth of these answers. An immaterial variation from the truth in an answer will not avoid the policy, if made in good faith. Thus, where the insured to a question replied that the principal was indebted to him in a certain sum, when in fact he was indebted in a larger sum, such answer, if made in good faith, will not avoid the policy. It would not have altered the action of the company in issuing the policy had the true state of facts been known to its officers.<sup>8</sup> A statement in the application that the insured does certain acts to check the accounts of the principal is an expression of a mere intention on the part of the insured, and a failure to carry out such intention, after the policy is issued, will not avoid the policy, even if the loss have occurred because of such failure. Thus, where the insured, in answer to a question in the application for a policy, said that the accounts of the principal were examined every fortnight by the finance committee, and subsequently, the principal defaulted because of the neglect of the finance committee to examine accounts, it was held the insured could recover on the policy.<sup>9</sup> Where, however, the insured represents that the employe whose fidelity the company insures collects certain sums of money each week, when, as a matter of fact, known to the insured,

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<sup>7</sup> 9 R. I. 168 (1869).

<sup>8</sup> 77 Fed. Rep. 117 (1896).

<sup>9</sup> 7 Exch. (Eng.) 744 (1852).

the employe collects very much more than that amount certain weeks in the year, the statement is a material misrepresentation which avoids the policy.<sup>10</sup>

**31. The Loss Insured Against.**—The policy usually insures against fraudulent and dishonest acts of the principal—the one whose fidelity is insured. For what causes of loss the company is liable depends largely on the conditions in the policy under which the loss is payable. Where a condition of the bond is that the principal shall faithfully discharge the trust reposed in him as an assistant bookkeeper of a bank, and the principal embezzles funds of the bank and makes false entries in the books to cover it up, the insurance company is liable on the bond. It will not do to say that the company is liable only for the want of reasonable skill and diligence of the principal as bookkeeper, and under the terms of the bond is not liable for fraudulent and dishonest acts of the principal in connection with his employment. The obvious intention of the bond is to vouch for his honesty and fidelity as an employe of the bank.<sup>11</sup> The insurance against the loss by want of integrity, honesty, and fidelity, or by the negligence, default, or irregularity of the manager of a bank, covers the loss arising because the manager allowed overdrafts without security, in collusion with the party overdrawing.<sup>12</sup>

Fraudulent or dishonest acts insured against in these policies may be classified in two categories—fraudulent and dishonest acts which are contrary to equity and good conscience and the civil law; and fraudulent and dishonest acts which go beyond that line and subject the perpetrator of them to the penalties of the criminal laws, such as embezzlement and larceny.<sup>13</sup> When nothing is indicated in the contract itself, both categories are included. But often the contract provides that only such loss is payable as arises from fraudulent or dishonest acts amounting to embezzlement or larceny; where such is the case, the insured, in order to recover under the policy, must show facts sufficient to

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<sup>10</sup> 7 Jur. N. S. (Eng.) 1,109 (1861).

<sup>11</sup> 21 N. Y. 88 (1860).

<sup>12</sup> 14 L. C. Jur. 186 (1870).

<sup>13</sup> *Ibid.*

establish that the principal has been guilty of such crimes.<sup>14</sup> It is not necessary, however, that there should have been a misapplication of money for himself by the principal, to render the company liable on its bond to the insured for the faithful performance by the clerk of his duty, for if he aid another in defaulting he is equally liable. Where the principal, a cashier of a railroad station whose duty it is to collect and account for all moneys each day at the station, allows other clerks to be in arrears each day and makes up the deficiency on one day by appropriating part of the funds received the next day, the company, which insured the faithful performance of his duties, is liable.<sup>15</sup>

**32. Diligence of the Insured.**—Unless the bond provide that the insured must exercise a certain measure of care, the company is not relieved from liability by reason of the fact that the loss occurred because of want of even ordinary prudence on the part of the insured. Negligence on the part of the directors of a bank in failing to examine the accounts of the cashier whose fidelity was insured is no defense against recovery on the policy when loss occurs, unless, by the provisions of the policy, the insured were obliged to exercise such precaution. The business honesty and fidelity insured by such a contract is not that kind of enforced honesty which comes from want of opportunity to be honest, but that which is sturdy enough to operate for safety in spite of opportunity and temptation. This is the only kind of insurance worth the premium paid by the insured, and, in the absence of any provision in the policy to the contrary, it is presumed in the law that the honesty which is insured is a kind of honesty which will not take advantage of lapses of watchfulness to construct deceitful appearances, adjusted to the familiar traits or habits of the employer. An employer needs no insurance against a close and relentless vigilance which makes stealing impossible, and under these contracts he is bound to no watchfulness, except that which he has contracted to use in plain terms, for the benefit of the company.<sup>16</sup>

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<sup>14</sup> 189 Pa. 596 (1899).

<sup>15</sup> 3 Exch. (Eng.) 766 (1849).

<sup>16</sup> 80 Fed. Rep. 766 (1896).

The insured, however, is bound to exercise good faith in his dealings with the company, and, when there comes to his knowledge the fact that the principal is guilty of acts of dishonesty or fraud in connection with his employment, he is in duty bound either to dismiss him from his service or notify the company, or do both. If, in such a case, he continue the principal in his service without notifying the company and a further loss occur, the company is not liable for the same.<sup>17</sup> Where, however, there is a mere failure on the part of the principal, who is employed as an agent or collector, to make prompt payment of the money collected by him, the insured is bound, neither to notify the company, nor to dismiss the principal for such default in payments; and, if a loss subsequently occur, the company is not released by reason of such continuance of the principal in the service of the insured.<sup>18</sup>

**33. Notice of Acts of Infidelity.**—The policy usually stipulates that the insured is to give written notice to the company, either within a certain fixed time or within a reasonable time after the insured has knowledge of any liability of the company that has been incurred or of any acts of the principal that might tend to make the company liable. This provision in the policy is a reasonable provision which must be complied with. A failure to give notice till five or six months after the insured discovered the fraud is not giving notice within a reasonable time, and the insured cannot recover on the policy because of such failure.<sup>19</sup> Nor will the fact that the company had knowledge of the default of the principal excuse the failure of the insured to give notice.<sup>20</sup> The insured is bound to give notice to the company after he has ascertained the facts of the misconduct of the principal, and the company is liable under the policy to make good the loss.<sup>21</sup> Mere suspicions on the part of the employer that the employe whose fidelity is insured is guilty of some fraud or dishonesty is not sufficient; nor the fact

<sup>17</sup> L. R. 7 Q. B. (Eng.) 666 (1872); 64 N. Y. 389 (1876).

<sup>19</sup> 73 Mo. App. 161 (1897).

<sup>20</sup> 87 Fed. Rep. 11 (1898).

<sup>18</sup> 12 Ins. L. J. 662, 665 (1883); 64 N. Y. 389 (1876).

<sup>21</sup> 6 W. R. (Eng.) 605 (1856).



that the insured might have known of such fraud. The law requires only that the insured send notice to the company within the required time after he has actual knowledge of such facts as would justify a prudent and careful man in charging another with dishonesty or fraud.<sup>22</sup>

**34. Change of Service.**—Where the company insures an employer against the dishonesty and fraud of an employe, it sometimes happens that the insured changes the position of the principal by promotion or by otherwise assigning different duties to him. If the company be notified and consent to the change, it would seem that it cannot afterwards complain if the principal make default subsequent to such change of his service. A different question arises when no notice of the change is sent to the company. In such a case, if the policy provide that it insures the employer while the principal is employed in a certain capacity, describing it, then, where there is a material change of the employment, the company is not liable on the bond, if the loss of the insured occurred by reason of the different position occupied by the principal.<sup>23</sup> Where, however, the principal, though his duties are changed, continues to act in the capacity under which he was insured, and the default is made while he is thus employed, the company is liable and cannot defend on the ground of the change of service, unless the loss which occurs were in some way connected with the changed service or superinduced by it. Thus, where the principal was insured as a bookkeeper of a bank and he afterwards, also, performed the duties of a teller, but default was made by him in connection with his duties as bookkeeper, the company was liable on the bond.<sup>24</sup>

**35. Provision to Prosecute Employe.**—Policies sometimes provide that the insured shall, when required by the company to do so, use all diligence in prosecuting the employe for any fraud or dishonesty in consequence of which a claim shall be made under the policy. Such a

<sup>22</sup> 170 U. S. 133 (1898).

<sup>23</sup> 41 N. J. Law 448 (1879).

<sup>24</sup> 75 Mo. 199 (1881).

provision is more generally present in the policies used in England, where there is no public prosecutor, than in the United States, but the private party who is wronged must prosecute the guilty one for his crime. Such a provision of the policy is a condition which the insured must comply with, and a failure to do so will bar a recovery under the policy.

**36. Period of the Risk.** — The company is not liable to the insured for any loss arising from a wrongful act of the principal, committed before the bond was executed, even though the principal continue liable to his master for the wrong. The company does not insure any acts except those occurring during the running of the policy.<sup>25</sup> Where a loss occurs during the running of the policy, but the defaulting employe skilfully covers it up from the insured for years, the insurance company is liable. In the absence of any provision of the policy to the contrary, the claim for loss occurring during the term of the policy would be barred only after the statutory period of limitation has elapsed, usually six years; and that period would not begin to run till after the discovery of the fraud of the principal, that is to say, the claim will only be barred six years after the employer discovered the fraud of the principal.<sup>26</sup>

The policy usually provides that the company is liable for all loss occurring during the term of the policy, but that the loss must be discovered within a certain period, as, for instance, twelve months after the term of the policy expires. The policy may further provide that the company shall be liable within the same period after the death or the dismissal or retirement of the employe from the service of the insured. This provision is valid, and, where claim is not made till long after the expiration of that period, no recovery will be allowed;<sup>27</sup> where the loss is not discovered till after the period prescribed in the policy, the company is not liable under the policy, even though earlier discovery of the loss was made impossible by the false entries of the principal.<sup>28</sup>

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<sup>25</sup> 97 Ga. 456 (1896).

<sup>26</sup> 80 Fed. Rep. 766, 778 (1896).

<sup>27</sup> 87 Fed. Rep. 118 (1898).

<sup>28</sup> 71 Fed. Rep. 116 (1895).

**37. Subrogation.**—When a loss occurs to the insured, and he presents the claim against the company and the company pays the claim, then, according to the well-known rule of law, the company is substituted to all the rights the insured has against the defaulting employee. The company stands in the shoes of the employer and may be subrogated to all the rights of the employer in the prosecution of dishonest employees, whose honesty it had insured to the employer and was compelled to pay on the said bond for the loss it had sustained by reason of dishonesty.<sup>29</sup> The principle of public policy on which this is based is that employers, such as banks and other corporations, exact bonds from the employees and simply look to those bound by the bond, in case any loss occurs to them, and, if they get their money, will not prosecute the employee, either civilly or criminally. Such wrong-doers would go unpunished, and, therefore, as a matter of public policy, the law gives the right to the sureties or companies who stand liable for their dishonesty to prosecute these dishonest employees.<sup>30</sup>

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<sup>29</sup> 63 Minn. 170, 180 (1895).

<sup>30</sup> 22 Fed. Rep. 639 (1885).

## CREDIT INSURANCE

**38. Scope of the Contract.**—Credit insurance is that kind of insurance which indemnifies the merchant or manufacturer wholly or in part for loss by the insolvency of the customers of such merchant or manufacturer. The insured is often called the *indemnified*. The law is clear that a contract which guarantees the payment of losses arising because of the failure of the debtor to pay the same is a contract of insurance, and the well-known rule of law that the provisions of the contract are to be interpreted strictly against the company and in favor of the insured operates in this class of contracts as well as in other kinds of insurance.

The peril of the loss from insolvency of the customers is just as definite and real a peril to the merchant or manufacturer as the peril of loss by accident or fire, and is in fact much more frequent. No reason is perceived why a contract of indemnity against this ever-present peril is not just as legitimate a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril of fire.<sup>1</sup> Whatever form such contract assumes, if its aim be substantially to accomplish this result, it is a contract of insurance. An agreement on the part of the company to purchase from a merchant or manufacturer at a certain price all accounts which during the year the merchant or manufacturer may have against insolvent debtors, is a contract of insurance. In Massachusetts, it seems that insurance of this character is not legal, because there is no authority for any company to engage in this kind of insurance.<sup>2</sup> It is believed that in all other states, as well as in England and in Canada, such insurance is perfectly lawful.<sup>3</sup>

**39. Plan and Interpretation.**—The plan of credit insurance is that the company issues for a money consideration

<sup>1</sup> 92 Wis. 366, 374 (1896).

<sup>2</sup> 165 Mass. 501 (1896).

<sup>3</sup> 43 N. Y. 298 (1896).

a bond of indemnity, which, together with the conditions and terms written therein, constitutes a contract between the company and the indemnified creditor. The bond indemnifies such creditor against losses resulting to him from the insolvency of his commercial or mercantile debtors.<sup>4</sup> There is usually a provision in the policy that, in the event of the failure or discontinuance of the business by the indemnified, the policy or bond shall become null and void. Even in the absence of such a provision, where there is a discontinuance of the business of the insured, the insurance ceases. Thus, where a policy is issued to a partnership securing the firm against loss on merchandise sold on credit, and a member of the partnership dies, this effects a change in the partnership, and the policy is void, except for losses that have accrued at the time of such death; where, however, the policy insures a partnership under its firm name, the mere change of name during the term of the policy, where there is no change of the members of the partnership, will not render the policy void.

The policy provides that when the indemnified dies or retires from the business in which he was indemnified, his policy shall become void. Where a partnership was thus insured and a member retired from the partnership, the contract of indemnity thereby became void.<sup>5</sup> Where the policy provides that in the event of failure or discontinuance of the business by the indemnified, the policy shall become void, and a member dies before the policy expires and before the insolvency of the debtor, the company is liable for losses and sales made prior to such death. The death of a member dissolves the partnership, but it does not discontinue the business of the insured.<sup>6</sup>

**40. The Policy.**—As now in use, the policy has very many provisions that have given rise to a great deal of litigation. Some of these provisions have been subjected to interpretation by the courts and their meaning explained.

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<sup>4</sup> 83 Md. 272, 275 (1896).

<sup>5</sup> 103 Fed. Rep. 609, 612 (1900).

<sup>6</sup> 7 H. & N. (Eng.) 17, 31 (1861).



It is often provided that no credit shall be included as covered by the policy, unless the debtor have a rating in one of the mercantile agencies, both with respect to his capital and his credit. It follows that where the insured gives credit to a customer who has no such rating, and incurs a loss because of the insolvency of that customer, he cannot recover under the policy, as such a loss is not covered by it.<sup>7</sup> Where there is a provision that no credit shall be given by the insured which exceeds a certain percentage of the lowest capital rating of the debtor in the latest book of a mercantile agency, and the insured gives a credit in excess of that percentage, then, in case of loss, the excess credit alone should be excluded from the protection of the policy, and not the total loss from such debtor.<sup>8</sup>

Usually these policies run for one year, with provision made for renewal. Some policies provide that final proof of losses suffered during the period covered by the policy must be presented within a certain time after the expiration of the policy. A loss occurring after the expiration of the policy, on sales made during the period which it covers, is a loss covered by the policy, if the other requirements of the policy be fulfilled. The reason for this rule of law is obvious. It is evident that the policy contemplates a credit business, for there would be nothing to insure if it do not. Of necessity, there would be sales immediately preceding the period when the policy expires under which the insured would receive no indemnity under the policy, if the insured should be deprived of indemnity on such sales. Moreover, the extension of time given the insured in which to make out proof of loss indicates that the policy allows him time to ascertain the credits of the sales made just previous to the expiration of the policy, and, therefore, indicates that such credits are intended to be covered by the policy.<sup>9</sup> Where, however, the policy provides that no proof of loss, occurring after the expiration of the policy, will be allowed, that provision is controlling, and a loss occurring even

<sup>7</sup> 57 N. J. Law 12 (1896).

<sup>8</sup> 92 Wis. 366 (1896).

<sup>9</sup> 112 Mich. 258 (1897).

a short time after the expiration of the policy is not covered by the insurance, even on sales made before its expiration.<sup>10</sup>

**41. Renewal.**—Where the policy provides that, in case it is renewed at the end of the period, all losses on sales made during its term, but which could not be provable under the policy before its expiration, may be proved during the period covered by the renewed policy, all such losses are governed by the terms of the first bond rather than the second, as the evident purpose of this provision is to extend the benefits of the first bond to a longer period.<sup>11</sup> By the terms of the policy, unless two months' notice be given, either by the company or the insured, of an intention not to renew the insurance, the policy shall be treated as renewed. In case no such notice is given, then the policy is renewed only for the same length of time as was covered by the first policy, and no longer; that is to say, if the original policy were for two years, then on failure of giving the required notice, the policy will be renewed for two years longer, and that is all. It will not continue to be renewed from time to time until the notice as provided is given.<sup>12</sup>

**42. The Debtor.**—The typical credit-insurance policy provides that the non-payment of debts must be caused by the insolvency of the debtor, and it contains a clause explaining that insolvent debtors are those who have made a general assignment for the benefit of all their creditors, who have been declared insolvent in legal or judicial proceedings, or whose business has been sold by the sheriff or other public officer under an execution or against whom an execution has been returned unsatisfied upon a judgment obtained by the indemnified for sales of merchandise covered by the policy. Where a debtor assigns a part only of his property for the purpose of paying a particular number of creditors, he is not an insolvent debtor within the meaning of the policy, and a loss by the insured from such a debtor is not a

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<sup>10</sup> 54 N. Y. 505 (1898).

<sup>11</sup> 103 Fed. Rep. 609 (1900).

<sup>12</sup> 7 H. & N. (Eng.) 5 (1861).

loss covered by the policy which contains a definition of insolvency as given above.<sup>13</sup>

In case the insured issues execution against the debtor on a judgment for merchandise sold during the running of the policy, and the execution is returned unsatisfied, the mere fact that the execution was not returned till three days after the expiration of the term of the policy will not relieve the company from liability, where the other terms of the policy have been complied with.<sup>14</sup> But, where no judgment had been obtained nor any execution issued against such debtor of the insured until after the expiration of the terms of the bond, the loss is not covered by the policy.<sup>15</sup>

**43. The Loss.**—The failure of the debtor of the insured to pay the debt is the loss insured against. Where the failure to pay occurs within the provision contained in the policy, the company is liable to pay it. Thus, a policy provided that, in case the debtor, a certain corporation, failed to pay the principal debt on certain debentures held by the insured three months after they become due, the insurance company should pay for the same. At about the time the debenture of the insured became due, the other debenture holders passed a resolution that the payment on all the debentures should be postponed for several years. It was held that under the terms of the policy, when default was made within three months after the debentures of the insured became payable, the company was liable to pay the insured the whole amount of the unpaid debt, provided, however, that the company should succeed to all the rights of the insured on the debentures held by him. The usual provision of the policy is, as we have previously stated, that the company is liable only for loss of insolvent customers of the insured.<sup>16</sup>

**44. Initial Loss.**—One of the peculiar features of the credit-insurance policy is the provision which is contained in the typical credit policy in the United States with reference

<sup>13</sup> 17 N. Y. App. Div. 474, 477 (1897).

<sup>14</sup> 166 N. Y. 416 (1901).

<sup>15</sup> 9 N. Y. App. Div. 433 (1896).

<sup>16</sup> (1897) 1 Q. B. (Eng.) 517.

to the initial loss. This clause states that the insured himself shall suffer a certain amount of the loss, either in proportion to the losses which have occurred during the term of the policy, or a certain percentage of the gross sales of the year, which shall not be less than a certain figure. For example, where the policy covers a loss of twenty thousand dollars and provides that the indemnified shall stand an initial loss of two thousand dollars on sales of a certain amount of goods, the insured, in order to recover the full face value of the policy, will have to show a loss covered by the policy of twenty-two thousand dollars.<sup>17</sup>

Other deductions are frequently made in the policy from the sum to be paid by the company, practically of the same nature as the initial loss. Where the policy running for one year provides that certain deductions should be made from the loss of the year, which shall be borne by the insured himself, and a further clause provides that the policy shall cover all losses on sales made the year just preceding, except certain losses already ascertained, the indemnified is not, under the terms of the policy, compelled to stand a deduction from the losses of the previous year's sales.<sup>18</sup>

Where the policy provides for a deduction from the losses of the year of an amount equal to one per cent. of the sales of the year, which according to a provision in the policy is to be not less than ninety thousand dollars, and the company puts an end to the contract before the year is over, the deduction is to be made of one per cent. of the sales that were made during the running of the policy, and not one per cent. of the ninety thousand dollars.<sup>19</sup> And where the policy provides that a certain proportion of the loss shall be suffered by the insured as an initial loss, and further provides that the loss of any one debtor shall not exceed a certain sum, as the sum of seven thousand five hundred dollars, and the insured incurs a loss from one debtor of twenty thousand dollars, the initial loss provided for in the policy is to be determined, not by calculating the required proportion

<sup>17</sup> 103 Fed. Rep. 609 (1900).

<sup>18</sup> 17 N. Y. App. Div. 474 (1897).

<sup>19</sup> 65 Minn. 283 (1896).

of twenty thousand dollars, the actual loss, but of seven thousand five hundred dollars, the loss covered by the policy. As the loss of twelve thousand five hundred dollars is not covered by the policy, the company has no interest in it. It, therefore, cannot make that loss any part of the basis of determining the initial loss of the insured.<sup>20</sup>

**45. Notice of Loss.**—The policy usually requires that the insured shall send to the company notice of the insolvency of the debtor within a certain number of days from the time when he receives knowledge of it. The purpose of this provision is to afford the company prompt information that loss has happened, for the purpose of investigation and for taking measures for the protection of its interests. Where the company requires such notice in the policy, the insured must furnish the same in order to recover for such loss. The company, under these provisions, is entitled to the notice even as to such loss which under the terms of the policy is an initial loss to be suffered by the insured himself.<sup>21</sup>

Where a policy provides that the insured shall give notice within a certain number of days after learning of the insolvency of the debtor, on blanks furnished by the company, and these blanks require an answer as to the failure of the debtor, the date, and nature of the failure, and the insured notifies the company within the required time by filling out one of these blanks to the effect that the goods of the debtor were seized by the sheriff in execution, causing suspension of the debtor's business, the notice is sufficient. The mere failure on the part of the insured to give subsequent notice to the company within the limit of time after his own judgment against the debtor was returned unsatisfied, will not defeat his right under the policy. The terms *failure* and *insolvency*, as used in this provision of the policy and in the blanks, are used in their commercial sense, and mean suspension of payment or compulsory suspension of business, and the nature of the failure means the kind or distinguishing character of the suspension, that is, whether it were voluntary or enforced.<sup>22</sup>

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<sup>20</sup> 41 N. E. Rep. 276 (1895).    <sup>21</sup> 54 N. Y. Supp. 505 (1898).    <sup>22</sup> 95 Fed. Rep. 111 (1899).



**46. Transfer of the Debt.**—The modern policy provides that when the losses are allowed by the company, the claims the insured has against the insolvent debtor for such losses shall at once be transferred to the company. It further provides that where the indemnified has a part interest in any one of such claims, as where only a part of the loss is covered by the policy, or it makes up the initial loss to be borne by the insured, the amount realized by the company thereon, less the costs of collecting the same, shall be divided *pro rata* between the insured and the company, as the interest of each shall appear. Thus, where the policy covers only a certain loss from any one debtor and the indemnified suffers a loss in excess of that limit, payments thereafter made by the debtor, either to the indemnified or to the company, or any security of the said debtor, must be distributed proportionally between the loss covered by the policy and the loss not so covered.<sup>23</sup>

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<sup>23</sup> 103 Fed. Rep. 609 (1900); 17 N. Y. App. Div. 474 (1897).

## TITLE INSURANCE

**47. Definition and Nature.**—Title insurance is a contract to indemnify the owner or mortgagee of real property from loss by reason of defective titles, liens, or encumbrances.<sup>1</sup> The business is usually carried on by incorporated companies, as in the case of other kinds of insurance. But these institutions are not always simply title-insurance companies; sometimes they embody in their corporate names and the scope of their business the functions of trust and safe deposit companies.

The specific business of a title-insurance company is substantially conducted by having the title to specified property examined on application of a purchaser, owner, or mortgagee, for whom an abstract of title is prepared, the correctness of which is guaranteed, whereupon a policy is issued to such person stipulating that he shall be indemnified for any loss that may arise to him by reason of a defect in the title. The organization of these companies is of recent origin, and few court decisions bearing upon their rights and liabilities have been rendered.<sup>2</sup> The few cases that have reached the courts have defined the law only as to certain matters connected with this class of insurance.

**48. Construction of the Contract.**—Like other contracts of insurance, title insurance is governed by the rules of law that govern all contracts, and especially all other insurance contracts. All doubts and ambiguities, if any, contained in the policy are to be resolved in favor of the insured.<sup>3</sup> As to formality, the general statements contained elsewhere in this title apply to this class of insurance.<sup>4</sup> Usually, therefore, a contract of title insurance includes a

<sup>1</sup> Bouv. Law Dict.

<sup>2</sup> Am. & Eng. Encyc. Law (1st Ed.), Vol. 26, p. 19.

<sup>3</sup> Frost Guar. Ins., Sec. 164, citing 70 Fed. Rep. 194 (1895); 67 Minn. 126 (1897).

<sup>4</sup> See *subtitles* Introduction, Form of the Contract, *supra*.

preliminary agreement, or application, and a policy. While the forms of both the application and the policy differ in the statements employed and the manner of soliciting the information to be given as preliminary to effecting the indemnity, there is no substantial divergence from the warranties mentioned in a well-known textbook on this subject, which states that "it is customary to require parties applying for title insurance to fill out printed applications for the same, wherein are to be found a number of questions relative to the proposed insurance. It is usually the practice to refer to this application by number in the policy and to therein provide that the facts stated in the application shall constitute warranties."<sup>5</sup>

A form of application in general use is one wherein the basis of the contract is recited and comprises the requirements for information as to (1) the name and address of the insured, and the interest to be insured; (2) a description of the property and the location thereof; (3) the name of the person or persons in possession and under whom possession is held; (4) the title vested, or by what means it is to be vested in the insured; (5) easements and encumbrances known or alleged to exist, stating which are and which are not to remain; (6) a statement of unrecorded deeds, agreements, adverse claims and interests, secret trusts, and defects in the title known to exist; (7) mineral reservations, if any; and (8) what part of the premises is used by others. There are, besides, other general requirements, such as a warranty of the genuineness of the execution of the instrument vesting title, and a stipulation that if the applicant have any further information or intimation as to defects, objections, liens, or encumbrances affecting the premises, he shall make them known to the company. Upon the execution of the application, a survey is directed to be made by the insurance company, in which is certified to the company the improvements, the person or persons in possession, an abstract of title, and, in general, full information as to the matter

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<sup>5</sup> Frost Guar. Ins., Sec. 165, citing 50 Minn. 429 (1892).

contained in the application, including the value of the property, its present rental, and to whom paid. Following the survey, a paper called the *settlement certificate* is made out by the company, which sets out the material information and terms upon which the policy is issued. Upon presentation of this certificate, the insurance company becomes, under the application, entitled to the entire charges for its services in effecting the insurance, including the policy fee.

**49. The Policy and Its Conditions.**—The policy of a title-insurance company completes the contract. It recites that, in consideration of the payment of its charges for the examination of title and also a premium named in the policy, it insures the applicant, his heirs, devisees, next of kin, executors and administrators, or transferees, against all loss or damage, not exceeding a certain amount therein mentioned, which the insured shall sustain by reason of defects or unmarketability of the title of said insured to the estate, mortgage, or interest described in a schedule thereto annexed, or by reason of liens or encumbrances charging the same at the date of the policy, saving all loss and damage by reason of the estates, interests, defects, objections, liens, and encumbrances excepted in an additional schedule, or by the conditions of the policy, thereto annexed and incorporated in the contract. The loss is to be ascertained in the manner provided in the conditions of the policy, and is payable on compliance by the insured with the stipulations of those conditions, and not otherwise.

In the first-mentioned schedule in the policy is contained (1) the estate or interest covered by the policy, (2) the deed or other means by which title is vested in the insured, and (3) a description of the property, the title to which is insured. In the other schedule, mentioned in the policy, is a reservation that the policy does not insure against such estates, interests, defects, objections to titles, liens, charges, and encumbrances affecting the premises, or the estate or interest insured, as are set forth in such schedule.

By the ordinary policy, the title-insurance company engages

to defend at its cost the insured in all actions of ejectment or other proceedings founded on a claim of title or encumbrance prior in date to the policy, and not excepted therein. In the conditions of the policy it is provided that in case any person, having an interest in the policy, shall receive notice or have knowledge of any such action of ejectment or proceeding, it shall be the duty of such person to at once notify the company thereof in writing and secure it the right to defend the action, and unless the company shall be so notified within a certain time, fifteen days being usually stipulated, the insurance shall be void as to such person. It is further provided in the conditions that any untrue statement or suppression of any material fact made by or with the knowledge of the insured, before the issuing of the policy, shall avoid the policy. The liability of the company to the holder of the policy, as collateral security, is restricted to the amount of the pecuniary interest of such holder in the property described, and it is provided that such liability shall not in any case exceed the actual value of the estate or interest insured.

Other conditions in the policy relate to the right of transfer, which is denied, except that a policy held by the owner of a mortgage or other encumbrance may be transferred to an assignee of the interest insured, or to a purchaser at a foreclosure sale, when the property sold is bought in by or for the insured, and except, also, in such cases as the company may, by special written agreement, permit. There is also contained in the conditions of the policy the statement that defects, liens, and encumbrances, arising after the date of the policy, or created or suffered by the insured, or for which the insured was responsible at the date of the policy, are excepted from the insurance.

**50. Liability of the Insurer.**—Within the ordinary scope of liability of a title-insurance company are defects in the title to the premises at the time the policy is issued, liens and encumbrances affecting the same at that time, and any defect apparent of record in the execution or filing for



record of the instrument of conveyance in connection with which the policy is issued.<sup>6</sup> The general intent and effect of the policies of such companies is to insure a valid security both as to title and against encumbrances. There is no implied agreement to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future encumbrances.<sup>7</sup>

As has been said, the law as to only certain matters connected with title insurance has been defined in a few cases. These relate chiefly to liability. For example, where a title-insurance company undertook to defend the interest of the insured in the premises against a lien, it was held that the company was bound to protect him through all stages of the proceedings to enforce the lien, as well after as before judgment thereon, or notify him that it could not do so, and furnish him necessary information of the status of the proceeding in time to enable him to protect himself; and, if after giving such notice, the company defended the proceeding, but thereafter abandoned the defense, it was necessary for it to give the insured another such notice. Where an insurer agrees to indemnify a mortgagee against loss not exceeding a certain sum by reason of encumbrances, and to defend the land against such claims, a loss occurring by reason of the negligence of the insurer is not limited to the certain sum stipulated in the contract.<sup>8</sup>

In a leading case, wherein the scope of liability of the insurer was determined, the policy issued by the insurer was conditioned against loss sustained through defects in the title to the real estate insured, or liens and encumbrances thereon existing at the date of the policy; also, that no action upon the policy should accrue until the insured had conveyed or agreed to convey to the insurance company his interest in the property, at a price which, in the case of a title acquired through a foreclosure, should be the amount bid at the foreclosure sale; that payment, discharge, or satisfaction of the

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<sup>6</sup> Frost Guar. Ins., Sec. 166, citing 60 Minn. 275 (1895).

<sup>8</sup> Bouv. Law Dict., citing 66 N. W. Rep. 364 (1896); 62 N. W. Rep. 287 (1897).

<sup>7</sup> *Ibid.*, citing 64 N. J. Law 24 (1899).

mortgage indebtedness, except by foreclosure of the mortgage, should annul the policy; and that the company should have an opportunity to defend any suits affecting the title. After the issue of the policy, suits were brought to establish mechanics' liens on the property claimed to have existed when the policy was issued. The company defended these suits, but the liens were established and the property sold to satisfy them. The insured foreclosed his mortgage by publication of notice and sale of the property and bought in the property for the amount due on the mortgage with interest and costs. The insured having died, a subsequent proposition by the insured's representatives to convey the property to the company for the amount bid at the foreclosure sale, and a demand, in default of purchase, that the company redeem the property from the sale under the mechanics' lien were declined. The representatives thereupon redeemed the property, and sued the company for the amount so paid. It was held that the purchase of the property by the insured at foreclosure sale, for the amount due on the mortgage, did not cancel the mortgage debt, and so annul the policy, but that the title company was bound, either to buy the property for the amount bid at the sale, or to redeem it from the sale under the liens, and that the insured's representatives were entitled to recover the amount paid by them for that purpose.<sup>9</sup>

**51. Measure of Damage.** — The liability of a title-insurance company being fixed, the matter of the amount of compensation that is due the insured is of next importance. The rule in this regard is that actual loss must precede actual compensation.<sup>10</sup> Where the purchaser of a property has received a policy insuring the title, which proves defective, the price paid for the property is the measure of damage, the amount of which price he is entitled to receive.<sup>11</sup> In the case mentioned as the leading one in determining the scope of liability, it was seen that the insured's representatives were

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<sup>9</sup> 70 Fed. Rep. 194 (1895).  
<sup>10</sup> 67 Minn. 126, 130 (1897).

<sup>11</sup> 156 N. Y. 10 (1898).

entitled to recover the amount paid by them for the purpose of redeeming the property from the sale had under mechanics' liens.<sup>12</sup>

**52. Breach of Warranties and Conditions.**—In all cases of misrepresentation, breach of any warranty in the application, or of any condition in the policy, the ordinary rules that govern other insurance contracts apply to title insurance. The insured is bound to the highest degree of good faith. A large risk is assumed for a small premium in reliance on the representations and warranties of the insured. The policy refers to the application as being the basis of the insurance, and the applicant agrees that the statements therein are true, and that any false statement or suppression of material information avoids the policy.

The judicial declaration in this regard is that answers to questions on applications are warranties in legal effect, and that the matter of their materiality is not an open question. Therefore, where the question in a case turned on a false answer by the applicant to a question respecting the last price paid for a property, there was contention as to whether the answer that named a false price paid for the property were material or not. The court held that "the answer to the question 'Last price paid?' was a statement of fact, and not the expression of an opinion, as a statement of value generally is. . . . The effect of falsity in the statement on the validity of the contract is not made to depend on the intent with which the statement is made, as that the intent shall be fraudulent, but on whether true or false, to the best of the applicant's knowledge and belief. Where the contract itself does not stipulate the effect that a particular false statement or representation shall have on the contract, or where it stipulates merely that the misrepresentation or suppression of a material fact shall avoid it, the fact misrepresented or suppressed must have been material, as an inducement to enter into the contract; and as the materiality must be shown by matters outside the terms of the contract,

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<sup>12</sup> 70 Fed. Rep. 194 (1895).

it is a question of fact. But the parties may, by their contract, determine the materiality for themselves, as where they stipulate that if a statement of fact made by one of them, and set forth in the contract, be false, it shall avoid the contract. In such case the statement is in effect a warranty. Whether they have made the statement material, and in effect a warranty, is a question for the court, to be determined by an interpretation of the contract."<sup>13</sup>

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<sup>13</sup> 50 Minn. 429 (1892), by Gilfillan, C. J.

# THE LAW OF MINES AND MINING

(PART 1)

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## INTRODUCTION

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### SCOPE OF TITLE

1. The law of mines and mining, as a phrase or term, is expressive simply of those special rules of law, which an authority has judiciously traced to deduction "by the application of general rules to the questions that arise as to the rights and duties of miners and mine owners in their relation to the land, to one another, and to those in contact with whom they are brought by reason of the business of extracting the various kinds of valuable minerals from the earth."<sup>1</sup> Hence, the principles herein stated are the outcome of decided cases; and to state these in a necessarily general way, in their applicability to the various persons engaged in the science of mining, is chiefly the design of our treatment, except that the definitions of the various terms employed in the business of mining are given, more or less specifically, as auxiliary to a perfect understanding of the propositions set forth. It is not the purpose of any part of our instruction to deal with mineral formation. That task is more appropriate to another branch of the science of mining. It is, however, indispensable that there should be considerable attention given to property in mines and minerals, and the rights of persons in relation thereto, as information on that division of our subject is most important.

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<sup>1</sup> Barr. & Ad. M. & M., p. vii of preface.



## DEFINITIONS OF TERMS

**2.** A **mine** is an excavation in the earth for the purpose of getting metals, ores, coal,<sup>2</sup> or other mineral substances. Strictly, a mine is not properly so called until it is opened. Before it is opened, it is at best but a vein or lode.<sup>3</sup> This is further explained hereinafter. A *vein* or *lode* is a seam or layer of any substance intersecting a rock or stratum, and not corresponding with the stratification;<sup>4</sup> an occurrence of ore, usually disseminated through a gangue or veinstone, and having a more or less regular development in length, width, and depth.<sup>5</sup> An opened vein is often called a mine, but when the term mine is used, it is generally understood that the excavation so named is in actual course of exploitation; otherwise, some qualifying term, like *abandoned*, is required. No occurrence of ore is designated as a mine, unless something have been done to develop it by actual mining operations.<sup>6</sup>

The essential difference between a mine and a quarry is that the latter is usually opened to the day, the article produced, such as stone for building and other purposes, being worked upon or above the ground. In a mine, part of the excavation may be an openwork, but most of the mineral or metal substance is gotten from underground workings. There are certain excavations which are called neither mines nor quarries, as, for instance, places where clay is being dug out for bricks. In England, such places are called *pits*, and also *openworks*.<sup>7</sup>

**3.** The term **mineral** is applied to any constituent of the earth's crust, other than vegetable. More specifically, it is an inorganic body occurring in nature, homogeneous and having a definite chemical composition which can be expressed by a chemical formula, and further having certain distinguishing physical characters.<sup>8</sup> Popularly the word is

<sup>2</sup> Cent. Dict.

<sup>3</sup> 2 Mod. (Eng.) 193 (1676).

<sup>4</sup> Webst. Dict.

<sup>5</sup> Cent. Dict.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

used in a narrower sense, and when people talk of minerals, they frequently use that word in reference to metals or metalliferous ores. Usually, in legal documents, the word means any substance gotten from the ground by mining or quarrying.<sup>9</sup> *Coal* is a more or less distinctly stratified mineral, varying in color from dark brown to black, brittle, combustible, and used as fuel, not fusible without decomposition, and very insoluble.<sup>10</sup> The word *metal* means a firm, heavy, hard substance, opaque, fusible by fire, and concreting again when cold into a solid body, such as it was before, malleable under the hammer, bright, glossy, and glittering when newly cut or broken.<sup>11</sup> *Ore* is the compound of a metal with some other substance, as oxygen, sulphur, or arsenic, by which its properties are disguised or lost. Metals not so combined are called native metals.<sup>12</sup> A *fossil* is an organic body so situated in the earth, buried in solid rock or in earthy deposits, as to be capable of indefinite preservation.<sup>13</sup> The term may apply to stones dug or quarried.<sup>14</sup>

4. **Surface** means the outside layer of the earth. *Soil* includes the surface and all below it to the center of the earth. The term is often used to denote the upper cover of the earth, especially that part thereof which sustains vegetable life. *Subsoil* includes all that is below the actual surface of the earth, down to the center.

5. The phrase **produce of the mine** includes not only that which is produced from the mine in its original state, but also such articles as are derived therefrom. Coke is a produce of the mine, though its chemical properties have been changed by smelting or other process.

6. The **apex** of a vein is the highest point where it approaches the surface of the earth, and where it is broken on its edge so as to appear to be the beginning or end of the vein.

<sup>9</sup> L. R. 20 Ch. D. (Eng.) 552, 558 (1882).

<sup>10</sup> Cent. Dict.

<sup>11</sup> Johns. Dict.

<sup>12</sup> Stand. Dict.

<sup>13</sup> *Ibid.*

<sup>14</sup> 14 M. & W. (Eng.) 859, 872 (1845).

7. The term **anticlinal axis** denotes the ridge of a wave-like curve from which the strata dip on either side, as from the ridge of a house. **Synclinal** is the opposite to anticlinal and denotes a dipping, as strata toward one another on each side of the axis of the fold.<sup>15</sup>

8. The **dip** of a vein is its downward course, and this the locator may follow indefinitely even though it take him beneath the ground of another and outside of his own vertical side lines. The **strike** is its onward course, its direction or trend across and through the country. Upon the strike of the vein, the locator is confined to the section of the vein between his end lines.<sup>16</sup>

9. The **level** of a mine does not necessarily mean a plane, but the existing condition of the mine with reference to its surface.<sup>17</sup>

A mine is said to be *won*, when a practicable, available access is reached to work it. For instance, when an access is reached for the heavers of coal, so that they may enter on the practical work of getting coal, then the coal field is won.<sup>18</sup>

10. A **colliery** is commonly defined as a place where coal is dug; but the term includes, not only the coal mine or pit itself, but also the engines and machinery used in raising the coal and discharging the water—all the requisite apparatus for working the mine. The term is often used to include the business carried on as well as the place where mining is done, and the plant.<sup>19</sup>

11. **Mining**, in its broad sense, is the business or work of a miner, and in the common use of the term may apply to the owner or lessee, who is also the operator, as well as to one who is engaged in digging for metals or minerals, the latter being in some countries distinctively known as a **miner**. Thus, in the United States, the persons employed at a colliery are designated *miners, laborers, engineers, firemen*,

<sup>15</sup> Cent. Dict.

<sup>16</sup> Barr. & Ad. M. & M., p. 441.

<sup>17</sup> 8 Exch. (Eng.) 908 (1855).

<sup>18</sup> L. R. 13 Ch. D. (Eng.) 277 (1879).

<sup>19</sup> Johns. Dict.; Cent. Dict.; (1898) 1 Ch. (Eng.) 634.

*inside* and *outside bosses*, and by other terms; yet, all are miners, if they be engaged in the occupation of mining, but the men actually engaged in the work of taking the minerals from the veins are, technically, miners.

**12.** A **mining claim** is a parcel of land containing precious metal in its soil or rock. A **location** is the act of appropriating such parcel, according to certain established rules. If the miner have only one location, the term location is identical with mining claim, and the two terms may be indiscriminately used to denote the same thing.<sup>20</sup>

**13.** The term **placer** denotes a superficial deposit occupying the bed of an ancient river; but, in the definition prescribed by the United States congress, the term includes "all forms of deposit, excepting veins of quartz or other rock in place." The law divides all mineral deposits into lodes or veins, and placers, the former forming an accurately defined class, and the latter including all other deposits. A **placer claim** is ground within defined boundaries containing valuable deposits usually not fixed in rock, but in a loose, unconsolidated state, such as gravel beds, so that the mineral may in most cases be collected by simple washing or amalgamation without milling.<sup>21</sup>

**14.** The importance of a full and complete understanding of the relative meaning of certain principal mining terms is obvious. There is need of a brief review of such as are frequently employed herein. Thus, **veins** are described as fissures in rocks, filled with materials of quite a different nature from the rocks in which the fissures occur.<sup>22</sup> **Seam** is a thin layer or stratum—a narrow vein between two thicker ones, as a seam of coal.<sup>23</sup> If there be a particular number of veins within or under a piece of land, there are precisely the same number of mines occupying precisely the same areas. In this sense the primary meaning of mine is vein. Consistently, however, with this, each seems to

<sup>20</sup> 104 U. S. 649 (1881).

<sup>21</sup> Barr. & Ad. M. & M., p. 476, citing U. S. R. S. Sec. 2,329.

<sup>22</sup> Encyc. Brit., quoted in MacSwain M. (2d Ed., p. 1).

<sup>23</sup> Webst. Dict.

have a distinct meaning of its own. Strictly, a mine is not properly so called until opened; it is at best but a vein before, as has been stated. It is held that a grant of lands and mines, where some of the veins in question are open and others hidden, will not pass the open veins. On the other hand, mines, where unopened mines are spoken of, mean in strictness nothing more nor less than veins or seams. In fact, mine appears in its primary sense to imply openness, and vein or seam appears in its primary sense to exclude that notion. In a secondary sense, however, mine may be said to mean a closed vein; yet, that which is not open may be called a mine. The word mine is frequently used in the secondary sense of a section of a vein. For example, that portion of a vein, which is confined within the ambit of a particular property, may with propriety be called a mine, and is so considered for rating purposes, and for the purpose of regulating the rights and duties of its owner in respect of the other portions. On the other hand, the term mine is frequently used in the secondary sense of an aggregation of veins or seams. Though "the primary meaning of the word *mine*, standing alone, is an underground excavation, made for the purpose of getting minerals, it is commonly used in leases and similar documents in a slightly different sense. There the word includes the stratum of the minerals as well as the excavation made to win it. Although the word *mine* generally points to underground, and the word *quarry* to surface, workings, these are not their only or necessary meanings. The word *mines* is in a secondary sense very frequently applied to a place where minerals commonly worked underground are being wrought, though in the particular case the working is from the surface. For example, where iron is got by surface workings, they are spoken of as iron mines, and so, too, with coal which crops out at the surface. . . . On the other hand, the term *slate quarry* is undoubtedly sometimes made use of, though the workings are underground."

<sup>24</sup> Encyc. Brit., pp. 3-7, citing 2 Ad. & El. (Eng.) 598 (1835); 31 Beav. (Eng.) 334 (1862); 20 Ch. Div. (Eng.) 555 (1882); L. R. 13 App. Cas. (Eng.) 684 (1888).



15. Some English cases have held that to render a mine an open one it must be dedicated for the purpose of commerce on the property, but it is not necessary that the produce of the mine should be actually carried to the market and be sold, or that a profit should have actually been made. If a mine be worked for commercial purposes, that will ordinarily be decisive as to the character of the mine and will render it an open one. Moreover, if there have been workings on the mine not limited to any restrictive or special use, it is an open one, and it is not necessary to introduce the test of a sale of the produce as a criterion of the difference between an open and a new mine.<sup>25</sup> Where, however, a mine has been opened for a restrictive or definite purpose, as to obtain fuel for an estate, or for the purpose of repairs on the premises, that would not render the mine an open one.<sup>26</sup> And the mere experimenting for the purpose of locating certain minerals, or the mere preparation to open a mine, does not of itself constitute the mine an open one.<sup>27</sup>

A mine which was worked at one time, but was abandoned for a great many years, as, for instance, a hundred years, cannot be considered an open mine; where the mine has been abandoned for the comparatively short period of fifteen years, the owner having ceased working on it so as not to impoverish the property in question, it will be considered a closed mine; but, where work on a mine has ceased only for twelve months or two years, it will not be considered a closed mine; and, where a mine had not been worked for a longer period but work was stopped on it, not for the benefit of the property but because it did not prove remunerative, and subsequently by a rise of the price in the products or for some other reason the working of the mine became remunerative, it will not be considered a closed mine.<sup>28</sup>

Where there is an open mine on the land, the reaching of a new mine by a new shaft in another part of the same

<sup>25</sup> 3 J. & La T. (Eng.) 397, 417 (1846); L. R. 4 App. Cas. (Eng.) 454, 460 (1879).

<sup>26</sup> L. R. 4 App. Cas. (Eng.) 454, 460 (1879)

<sup>27</sup> 2 Beav. (Eng.) 466 (1839).

<sup>28</sup> 32 Beav. (Eng.) 509 (1863).

property will be considered opening a new mine. Thus, where a coal mine is opened and worked on the land, and the tenant in possession finds in another part of the same land mines of lead or ironstone which could not be reached by means of the old shafts or openings, this would be opening a new mine.<sup>29</sup> But the sinking of a new shaft for the purpose of reaching the vein that has already been opened, is not the opening of a new mine.<sup>30</sup> Where there are several seams that can be reached by one shaft, the reaching a lower seam by the same shaft by which an upper seam has already been worked, is not the opening of a new mine.<sup>31</sup>

### PROPERTY IN MINES AND MINERALS

**16. Rights of Owner.**—Land includes not only the ground or soil, but everything attached to it, above or below. The maxim of the law is “he who owns the soil owns it up to the sky.” It is well settled that any one in possession of the surface of the soil is in possession of all below the surface, and may maintain an action against any one who cannot show a right superior to the right of the possessor, or justify under one who has such a right.<sup>32</sup> However, though minerals undisturbed, or in place, are a part of the freehold, and as such usually belong to the owner of the soil, they are capable of separate ownership and distinct possession. When there is such a severance of estates, the minerals constitute a separate corporeal hereditament, capable of distinct inheritance and conveyance.<sup>33</sup>

One who is the absolute owner of the land and is in possession of the same has the full right to work the mines at his pleasure; but it is different where the owner of the land is not in possession of it, but has given possession thereof to another for a limited period of time; or where the one who owns the land has only a limited interest therein, others having rights in the land which he must respect.

<sup>29</sup> 31 Beav. (Eng.) 334, 337 (1862).

<sup>32</sup> 53 Vt. 614 (1879).

<sup>30</sup> 32 Beav. (Eng.) 509, 517 (1863).

<sup>33</sup> Barr. & Ad. M. & M., p. 35.

<sup>31</sup> L. R. 4 App. Cas. (Eng.) 454, 460 (1879); 1 Rand. (Va.) 258 (1822).

The grant of the permanent or absolute interest in the minerals, effecting such a severance as to constitute a separate corporeal hereditament, is equivalent to a conveyance in fee of the estate in the minerals separate from that of the owner of the soil. The owner of the land may likewise create an interest in the minerals distinct from his ownership of the land by the creation of a *right to take* the minerals, retaining the property in them until they are severed and in the possession of the grantee. Thus, "there arise," says an authority, "two clearly distinguished classes of the mineral estate: (1) The absolute corporeal ownership of the minerals in place; and (2) the incorporeal right or license to mine for the minerals in the earth. Lying between these is the right and property of one who holds land under lease for years for the purpose of or with the privilege of mining." The instruments creating these interests are called *mining leases*, which are explained hereinafter.<sup>34</sup>

**17. Rights of Life Tenants.**—The rights in general of a tenant for life to deal with the property have been explained.<sup>35</sup> As to mineral land, the tenant for life is not the absolute owner of the land, for the reversioner or the remainder man has certain rights therein. He cannot, therefore, freely mine out all the minerals of the estate. However, the law is that, in the absence of anything appearing to the contrary, the tenant for life has the right to work all the open mines on the premises, but has no right to the unopened mines; that is, he has no right to open new mines and work them.<sup>36</sup> To do so would be to commit waste, and, as has been shown, a tenant for life may not commit waste.<sup>37</sup> Where mines, whether coal pits or quarries, have been already opened when the tenant having a limited interest comes into possession, the person having that limited interest is at liberty to work those coal

<sup>34</sup> Barr. & Ad. M. & M., p. 35; see *subtitle* Mining Leases.

<sup>35</sup> See *The Law of Property: Rights of Life Tenants*.

<sup>36</sup> 2 El. & B. (Eng.) 132, 146 (1853).

<sup>37</sup> See *The Law of Property: Rights of Life Tenants*; 81½ Pa. 114 (1873).

pits or quarries. This is in the nature of the produce of the soil. It is supposed to be the intention of the one granting that limited interest that the one to whom it is granted shall be at liberty to work the open mines. He brings the minerals so worked within the category of fruit. The produce of the mine is a part of the annual profits of the estate and belongs to the tenant in possession of the land.<sup>38</sup>

The general rule in the United States is that the tenant has a right to work the open mines even to exhaustion, provided he do not injure the surface of the soil. He is bound to use ordinary care in not injuring the land through his mining operations.<sup>39</sup> In England, this right of the tenant is not so extensive; that is, the tenant with a limited interest in the land will not be permitted to work the mine irrespective of the rights of the reversioner or the remainder man. He will not be permitted to work the mine to exhaustion to the ruin of the inheritance. The tenant having the right to work open mines on the estate, it follows that where the owner of the fee allows another to work these mines, the tenant is entitled to the rent or royalties which are paid by the one who works these mines.<sup>40</sup>

A wife's dower interest in the mines on the estate of her husband is similar to the rights of a tenant for life. She is entitled to her dower interest in all mines that have been opened and worked during her husband's lifetime. She is, moreover, entitled to work all the mines that were opened by the heirs after the decease of her husband, and before the assignment of her dower. She has no interest in any of the mines that have not been opened at all, but she is entitled to her part interest in the profits, rents, or royalties arising from the mines that were opened by the heirs after the death of her husband.<sup>41</sup>

**18. Rights of Tenant for Years.**—A tenant for years has the same mining rights on the demised premises as a tenant for life. Generally such a tenant may work open

<sup>38</sup> L. R. 8 App. Cas. (Eng.) 641-656 (1883).

<sup>39</sup> 85 Pa. 344 (1877); 106 Pa. 386 (1884).

<sup>40</sup> 24 Beav. (Eng.) 114, 123 (1857).

<sup>41</sup> 73 Ill. 405-409 (1874).

mines, but may not open new ones. But, by the terms of the lease the rights of such a tenant with reference to mines may be enlarged or diminished.<sup>42</sup> Thus, where, by the terms of the lease, the tenant is granted every privilege appertaining, among other things, to mines and minerals of whatever description, the tenant has the right to open new mines on the demised premises, and to dig the minerals from them, especially where there are no open mines at the date of the lease; otherwise, the grant as to the mines would not have any effect. For, it is a well-settled rule that when anything is granted, all the means to obtain it, and the fruits and effects, are granted also.<sup>43</sup> On the contrary, the tenant's right to dig minerals may, by the terms of the lease, be limited. Thus, where, by the terms of the lease, the lands are demised for agricultural purposes only, such limitation excludes the right of the tenant to dig stone for commercial purposes in a quarry on the premises, though it was an opened quarry at the time of the execution of the lease.<sup>44</sup>

**19. Rights of Mortgagor and Mortgagee.**—The mortgagor when in possession of the premises may work all the open mines thereon. If, however, the security of the mortgagee be endangered by working the mines, the court will stop him from working the mines at the instance of the mortgagee; that is, if by working the mines the land be rendered of little or no value, or if its value be thereby so diminished as to become less than the mortgaged debt, the mortgagor will be stopped by the courts from continuing to work such mines.<sup>45</sup> The court will prevent the mortgagor from opening new mines, at the instance of the mortgagee.<sup>46</sup>

The mortgagee in possession has a right to work the open mines and quarries on the premises; that is, he has a right to work all mines that were open at the time he came in possession of the land, even those mines that were opened after the date of the mortgage. All the profits which he

<sup>42</sup> L. R. 8 App. Cas. (Eng.) 641, 647 (1883).

<sup>43</sup> 81½ Pa. 114, 123 (1873).

<sup>44</sup> 2 Keyes (N. Y.) 467 (1866).

<sup>45</sup> 21 W. N. Cas. (Pa.) 491 (1888).

<sup>46</sup> 10 Pa. Co. Ct. Rep. 263 (1891).



makes on working such mines the mortgagee must account for, as reducing the mortgage debt, but he must suffer all the losses that are incurred by him by such working, and cannot charge them to the mortgagor.<sup>47</sup> Ordinarily, the mortgagee has no right to work new mines. For example, where a mortgagee in possession of the mortgaged premises has opened new mines thereon and worked them, he will be charged with the receipts but will be disallowed the expenses he has incurred in working the mine. The law is otherwise when the security is insufficient; and, where no interest has been paid on the mortgage for many years, it will go a long way to show that the security is insufficient. Where such is the case, the mortgagee can open and work new mines, and he will be chargeable only with the profits he has made therefrom.<sup>48</sup>

**20. Rights of Joint Owners of the Soil.**—Where the land is owned by more than one person, in common, each tenant in common has a full right to mine on the land, provided he do not take more than his share. By this is meant, not that each coowner can dig out his share of all the minerals there are in the soil, but that each owner is entitled to his share of the proceeds; as, where there are three coowners of the land, each owner is entitled to one-third of the minerals that are dug.<sup>49</sup> It is clear that each owner cannot, as against the will of the other owners, send a separate set of miners down a shaft to work only his share. If each coowner should do so, it would be impossible for the work to continue.<sup>50</sup> Each tenant is accountable to his cotenants for their share of all that he mines. This obligation is enforced in the same manner in the case of mines as in the case of the profits of any other estate owned jointly.<sup>51</sup> Where a tenant takes more than his share of the minerals, he must account to the coowners. In making the account he will be entitled to an allowance of the cost of the severance of the minerals and the cost of bringing the

<sup>47</sup> L. R. 4 App. Cas. (Eng.) 454, 460 (1880);

2 J. & W. (Eng.) 553, 555 (1821).

<sup>48</sup> 31 Beav. (Eng.) 470 (1862).

<sup>49</sup> L. R. 20 Eq. (Eng.) 84, 93, 94 (1875).

<sup>50</sup> 1 J. & W. (Eng.) 297 (1820).

<sup>51</sup> 62 Pa. 278 (1869).

minerals to the pit of the mine.<sup>52</sup> In some of the United States, the rule is that the non-consenting coowners are entitled only to their proportionate shares of the profits actually realized in selling these minerals. In West Virginia, it is held that where a joint owner with the knowledge of the coowners invests large sums of money in getting oil from the land, he ought not to account to them for any more than their proportion of a customary royalty proper and fair under all the circumstances.<sup>53</sup> Where such a tenant works the mines without the consent of his coowners, and he suffers a loss, he cannot charge them with the loss.<sup>54</sup>

While each of the coowners has a full right to work the mines on the land, a license given by one of the cotenants to a stranger to enter and dig the mines on the land is of no effect as against his cotenants. Such a license is good as against the tenant giving the same; but the licensee cannot compel the other coowners to consent thereto, and, if he mine without the consent of the other coowners, he is accountable to them for their share of the minerals dug, less the expense of digging and removing such minerals from the mines. Moreover, a conveyance, by metes and bounds, made by one of the coowners, of his undivided interest in the mines, does not pass any interest to the grantee, as against the other coowners. Such a conveyance tends to prejudice the rights of the other coowners, as it is an attempt to make a partition without their cooperation. The cotenants may, however, confirm the grant by an appropriate conveyance; when this is done, the grant becomes in effect operative and binding on all concerned.<sup>55</sup>

### 21. Rights of Persons Not Owners of the Soil.

Unless metals and minerals be excepted in the instrument of conveyance, or have been before severed in ownership and the right thereto vested in another, the grant of an estate in fee in the land carries with it all the metals or minerals. Therefore, as has been stated, the ownership of the surface

<sup>52</sup> L. R. 20 Eq. (Eng.) 84, 97 (1875).

<sup>53</sup> 39 W. Va. 23, 64 (1894).

<sup>54</sup> 21 Beav. (Eng.) 536 (1856); 17 Ad. & El. (Eng.) 701, 721 (1851).

<sup>55</sup> 41 Conn. 112 (1874); 64 Wis. 546 (1885).

of the soil may be in one person and of the metals and minerals may be in another, each one owning a distinct estate in the land, subject to grant and conveyance, the same as any other interest in land. Both persons in such case are land owners.<sup>56</sup> Nothing is more common than that the surface right should be in one man and the mineral right in another; both are land owners—both owners of a corporeal hereditament.<sup>57</sup> By the severance that results from a conveyance by the owner of the land of the surface estate in fee, reserving to himself an estate in fee in the minerals, each estate is subject to the laws of descent, devise, and conveyance.<sup>58</sup> A deed conveying the mines and minerals in the land creates a distinct interest in the same, the title to the land remaining in the grantor. Such a conveyance passes an estate in fee in the metals and minerals, the form of the conveyance being unimportant. It makes no difference that it is called a lease, and that its terms are those used for leasing real estate. If it show an intention to convey all of the specified mineral in the particular land, it effects a *sale* or absolute conveyance thereof.<sup>59</sup> For example, in Pennsylvania, where the owners of land “granted, demised, leased, and to farm let all the merchantable coal under their land, with the exclusive right to mine and remove the same . . . until the exhaustion thereof under the terms of this indenture,” it was held that the instrument was an absolute conveyance of the coal as land to the defendant.<sup>60</sup> Previous to this decision, in the same state, it was held that a perpetual lease of all the coal beneath the surface of a certain tract, except certain specified portions to support the buildings erected on the surface, with the right to mine the coal and remove the same, the lessee paying therefor a certain sum per ton mined, in monthly payments, but for not less than sixty-five thousand tons each year, was not a mere lease, but a sale of the coal.<sup>61</sup>

This doctrine has, however, not been followed universally. In New York, it is held that such doctrine applies only to a

<sup>56</sup> 88 Ky. 91, 97 (1888).

<sup>57</sup> 31 Pa. 475, 483 (1858).

<sup>58</sup> 88 Ky. 91, 98 (1888).

<sup>59</sup> Barr. & Ad. M. & M., p. 36.

<sup>60</sup> 143 Pa. 293 (1891).

<sup>61</sup> 105 Pa. 469 (1884).

case, in which, by the terms of the agreement and in contemplation of the parties, the whole body of the coal, considered as of cubical dimensions and capable of descriptive separation from the earth above and around it, and as it lies in its place, is absolutely and presently conveyed. The thing sold must be such that it cannot be identified as land, and severed as land from the estate of which it forms a part.<sup>62</sup> In Ohio, the doctrine virtually as held in Pennsylvania is adhered to. There it is held that a bargain and sale of all the coal lying and being under certain premises in consideration of the payment of thirty cents per ton on all coal mined, the grantee to mine at least three thousand tons annually, is not a mere license, but passes absolutely to the grantee the fee of all the minable coal, so that no interest therein remains in the grantor which may be made the subject of a mortgage.<sup>63</sup>

**22. License to Mine.**—This subject has been referred to previously, touching the effect on cotenants of a license by one cotenant to a stranger. It remains to treat of the effect and status of licenses to mine generally. A license to mine properly passes no interest, nor transfers property in anything. It is in no respect a license if it be a grant of coal by deed, or the grant of a privilege to mine, in writing. The form of the conveyance excludes that. Because a mere license to enjoy a privilege in land is not an estate therein, it may be granted without deed, and even without writing, notwithstanding the statute of frauds.<sup>64</sup> If made by parol, the grant constitutes a license—a mere personal privilege which is unassignable, is concurrent with the right of the licensor to mine, is revocable at the will of the licensor, and vests no title in the minerals until they be severed by the acts of the licensee. A license, however, may also be created by an instrument in writing whose terms show an intention simply to confer a personal privilege to take minerals as land.<sup>65</sup>

In England, a pure license as such, which does not in its terms include a right of the licensee to take away and dispose

<sup>62</sup> 136 N. Y. 593, 603 (1893).

<sup>63</sup> 29 Ohio St. 41 (1883).

<sup>64</sup> 31 Pa. 477 (1858).

<sup>65</sup> Barr. & Ad. M. & M., p. 67.

to his own use the minerals he has dug pursuant to the license, does not give the licensee the right to take away the minerals he has dug as against the licensor, but he has a good right to such minerals as against a stranger.<sup>66</sup> In the United States, the law is that the licensee has the right to the minerals he has dug, by virtue of his license. He has a right to go on the land and is entitled to all he has mined during the operation of his mine.<sup>67</sup>

Although a mere license is revocable, whether given by parol or by writing under seal, yet there are circumstances when such a license will be held not to be revocable. Where acts done by the licensee, pursuant of his license, were of such a character that it would be a hardship on the licensee if the license were revoked, the licensor will not be permitted to revoke his license so as to prejudice the rights of the licensee. Thus, where the licensee has expended large sums of money in placing machinery, sinking shafts, and mining drifts, the license cannot be revoked without refunding these expenditures, or giving the party at least six months' notice and allowing him to remove his machinery.<sup>68</sup> And where the licensor stands by and sees large sums of money expended by the licensee, he will not be permitted to revoke the license after a good prospect has been struck.<sup>69</sup> In Wisconsin, provision is made by statute that a license to mine shall not be revocable after a valuable discovery or prospect has been struck by the licensee.<sup>70</sup>

**23.** A license to dig minerals is never exclusive unless expressed in such words as to show that this was the intention of the parties. Where the license gives the licensee the right to dig and carry away all the iron ore to be found on certain designated land, it does not grant an exclusive license. The word *all* shows only the extent of the license as to quantity, but does not exclude the grantor from digging minerals on the same land.<sup>71</sup> So, a reservation in the

<sup>66</sup> 11 Exch. (Eng.) 70 (1855); 13 M. & W. (Eng.) 837, 844 (1845).

<sup>67</sup> 33 Fed. Rep. 177 (1887).

<sup>68</sup> 3 Greene (Iowa) 344 (1851).

<sup>69</sup> 19 Ves. (Eng.) 144 (1812).

<sup>70</sup> Wis. Ann. Stat. 1889, Sec. 1,647, p. 987.

<sup>71</sup> 29 N. J. Eq. 233 (1892).



grant that the grantor, his heirs and legal representatives, shall have full and free liberty to get the coal and minerals which should be found within the land granted is not an exclusive right reserved in the grantor. No particular stress is to be put on the word *the* in the reservation so as to indicate that all of the coal or minerals are reserved.<sup>72</sup> The mere taking possession of a vein by the licensee will not be considered as giving him exclusive right therein, regard being had to the fact that the vein seems to run over a large extent of territory. Where the lessee has merely cleared an old pit without actually beginning work on the vein, this will in no case be sufficient to give him exclusive possession of the vein.<sup>73</sup> Where the license is not exclusive, the grantor can grant similar licenses to other persons, provided he do not defeat the object of the first license.<sup>74</sup> Where the circumstances are such that it is to be inferred to be the intention of the parties that the licensee shall have exclusive mining rights within certain designated land, the law will declare that his license within those boundaries is an exclusive license.<sup>75</sup>

**24. Right to Mine Founded on Prescription.**—The right to enter upon the land of another and take or dig minerals therefrom cannot be claimed by custom, either in England or the United States. Such right may, however, be claimed by prescription. The difference between custom and prescription is that a custom is a right which is claimed by a people as inhabitants of a certain locality. A right claimed by prescription is an individual right claimed by one, either because he is the owner of some estate, or because the right descended to him by inheritance or succession. Thus, a right claimed by the inhabitants of a certain township to enter on the land of the owner and dig gravel therefrom, claimed by custom, will not be allowed in law.<sup>76</sup> Where one can show an uninterrupted exercise of

<sup>72</sup> (1892) 1 Ch. (Eng.) 475, 486.

<sup>73</sup> L. R. 3 Ch. (Eng.) 524 (1866).

<sup>74</sup> 29 N. J. Eq. 233 (1892).

<sup>75</sup> 53 Pa. 229 (1896).

<sup>76</sup> 2 Black. Comm. 262, 263; 14 C. B. N. S. (Eng.) 229 (1863); 17 N. H. 524 (1845).

the right to take minerals for a certain period of time (depending on the law of the particular state) from the land of another, he establishes a right by prescription to dig the minerals. In England, the period is fixed by statute to be thirty years.<sup>77</sup> This right must be claimed by some one as the owner of a particular property, as to dig ore to feed a certain furnace; or he must claim it in gross, that is to say, as a right claimed by descent, or by succession, as such a right is claimed by an individual or by a body corporate. Such a right cannot be claimed by a township, not incorporated, as it cannot take by succession.<sup>78</sup>

**25. Sovereign Ownership of Minerals.** — In England, mines of gold and silver are called royal mines; mines containing the other metals are called base mines. By the law in England, all royal mines belong to the king by the prerogative of the crown, judicial explanation of which is thus given: "It seems probable that at one time, the right to all mines, even in the land of a subject, was vested in the crown, but that in the course of years the right to get all base metals in his land was conceded to the subject who owned such lands. In this concession, however, no royal mines, or mines of gold or silver, were included, and such mines have from the first always been, and still are, the exclusive property of the crown, as part of the royal prerogative. This right of the crown to all gold and silver extended not only to those metals themselves when found in a comparatively pure state, but also to all other ores and substances containing gold and silver. It was decided during the reign of Queen Elizabeth that all the gold and silver within the realm, whether they be in the lands of the queen or of subjects, belong to the queen by prerogative, with liberty to dig and carry away the ores thereof and with other such incidents thereto as are necessary to be used for the getting of the ore. And if the gold or silver in base metals in the land of a subject be of less value than the base

<sup>77</sup> Stat. 2 & 3 Wm. IV, c. 71, Sec. 1.

<sup>78</sup> 74 Pa. 25, 32 (1873); 14 C. B. N. S. (Eng.) 229 (1863).

metal is, then the base metal together with the gold or silver in it, belongs by prerogative to the crown. Thus, it was decided that a large quantity of copper from a copper mine belongs to the crown because it contained some gold and silver."<sup>79</sup> Subsequently, it seemed to have been considered that if the value of the gold or silver, when extracted from the base metal was worth more than the cost of refining it, the mine was a royal mine and the baser metal as well as the gold or silver belong to the crown. Otherwise, if the cost of extracting the gold or silver from the base metal were more than the worth of the precious metal extracted, the mine is not a royal mine and does not belong to the crown.

**26.** During the reign of William and Mary, a statute was passed which provides that in England, Wales, and Berwick-on-Tweed, mines containing ore of copper, tin, iron, or lead shall belong to the owner of the mine, even though it contain gold or silver, provided, however, that the crown can elect within thirty days after the ore has been raised from the mine and laid upon the bank, to take the same by paying a certain fixed price per ton of washed, made clean, and merchantable ore.<sup>80</sup> This act by its terms only applies to England, Wales, and Berwick-on-Tweed; hence, the law as to royal mines in other parts of the British Empire, as in Ireland, is not affected. Moreover, where ore containing gold and silver is not copper, tin, iron, or lead ore, the statute does not apply, and the old law with reference to royal mines still holds good. Nor does that statute apply where the mine is worked as a gold mine, even though it contain either copper, tin, lead, or iron, but in such small quantities as to make it valueless for the purpose of working.<sup>81</sup>

In the United States, the law as to ownership of precious metals in land that is private property is in great conflict in many state jurisdictions. In Oregon, the law has been

<sup>79</sup> (1891) 1 Ch. (Eng.) 431, 444; 1 Plowd. (Eng.) 336 (1568).

<sup>80</sup> Stat. 5 Wm. & M., c. 6.

<sup>81</sup> (1891) 1 Ch. (Eng.) 432.

declared to be that the mines of precious metals belong to the eminent domain of the political sovereignty, that is, the state, for the benefit of the people.<sup>82</sup> In California, it has been declared that the common-law right of the crown is not a necessary ingredient which passed to the state. The doctrine that the common-law right of the crown to all mines of precious metals vests in the state as the successor of the royal sovereign is rejected as inapplicable to American institutions, and it is held that the right of the British crown was a personal prerogative and not an incident of sovereignty.<sup>83</sup> In New York, the right of the state to mines of gold and silver is declared by statute, which provides that all mines, the ore of which shall contain less than two-thirds in value of copper, tin, iron, and lead, or any of these metals, belong to the state.<sup>84</sup> In New Jersey, the prerogative right to royal mines was formerly asserted;<sup>85</sup> and this was so in the early days of its history. However, it is not necessary to further discuss a question which, as stated by authority, "is abstractedly of small importance. Since the title to most, if not all, of the land in the United States is derived from grants by the sovereign, the right to minerals therein is governed by reservations in those grants or by the organic law of the states. In the absence of a reservation to the sovereign, the owner of the land is the owner of all the minerals therein. The question of this right of the sovereign to mines in the public domain, or to mines reserved in the land that was once the property of the sovereign, is a distinct question not involving any question of regalian right."<sup>86</sup>

**27. Minerals Under Navigable Streams and Public Highways.**—In England, the soil covered by the navigable streams and along the shores of the sea below the ordinary high-water mark belongs to the crown. It follows that all minerals within those limits do not belong to the owner of the adjoining land, but to the crown. In the United States,

<sup>82</sup> 5 Ore. 104, 106 (1873).

<sup>83</sup> 17 Cal. 199, 220 (1862).

<sup>84</sup> N. Y. R. S. 1894, p. 409.

<sup>85</sup> 30 N. J. Eq. 323 (1878), note.

<sup>86</sup> Barr. & Ad. M. & M., p. 179.

such land and minerals therein belong to the state within which they are situated. It follows that the state can prevent any one, not licensed by it, from digging minerals in the soil, and it may recover the value of the minerals dug from the one who dug the same without having any right to do so. Where, however, one has dug minerals or gathered stones from the bed of a navigable river, without license from the state, no third party can assert title to them or take the same away from the one who has dug them.<sup>87</sup> So long as the state does not object, the one who dug the minerals is entitled to them, and his title to these minerals is good against every one. No person other than the state can deprive him of these minerals, and shield himself behind the state's title to them.<sup>88</sup> The state may by a specific grant convey the right to dig minerals in the soil under navigable streams, or under the sea, to an individual or to a corporation.<sup>89</sup> It seems that only the legislature of the state would have the right to make such a grant. Such a grant cannot be validly made by the officials of the state, such as the governor, secretary, or treasurer.<sup>90</sup> Such a right granted by the state is not a grant of the soil itself, nor of the minerals of the soil, but a right to dig the minerals in the soil and to take away and appropriate to the grantee's use the product of his digging. It is in the nature of a license.<sup>91</sup>

The law as to minerals under highways depends upon the title of the roadbed, and the reservation in case the title to the surface is alienated. If the title of the roadbed be in the state or a municipality, the state or municipality owns the minerals thereunder. Where the title is in a private person, the ownership, also, of the minerals is in such person, in accordance with the proposition, stated before, that land includes not only the ground or soil, but everything attached to it, above or below.<sup>92</sup> If such owner of the land dedicate a street thereon to public use, reserving therefrom the minerals, and subsequently convey lots described

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<sup>87</sup> 144 U. S. 550 (1884).

<sup>88</sup> 38 Pa. 380 (1861).

<sup>89</sup> 144 N. E. Rep. 550 (1892).

<sup>90</sup> 22 S. C. 50 (1884).

<sup>91</sup> 18 Pa. 70 (1851).

<sup>92</sup> See *subtitle Rights of Owner supra*.



as bounded on such streets, the grantees succeed to the grantor's right to the minerals. In Kansas, cities may by contract dispose of the right to mine beneath the streets, subject to the duty to make compensation to owners of private property for injuries done by the operations. In Ohio, the owners of land over which a highway passes may mine thereunder, with the consent of the municipal authorities, upon giving security.<sup>93</sup>

**28. Minerals in Land Taken by Right of Eminent Domain.**—When land is taken by a railroad company, by right of eminent domain, for the purpose of constructing a road, all the right that the company thus acquires is a mere use of the land for the purpose of its road, a right of way over the land. The owner of the soil still retains ownership of the land and, as a consequence, is entitled to all the minerals within the land.<sup>94</sup> The company has a right to make excavations, fills, and embankments, and, as incidental to this right, may lawfully quarry and remove stone and earth from one point to another on the line of the road. It is generally considered, however, that the company has no right to the soil and the quarries under and within the space occupied by the road for the purpose of repairing.<sup>95</sup> In Pennsylvania, the law seems to be that the company has the right to use the soil within the limit of the road, for the purpose of repairing the road.<sup>96</sup>

Minerals lying below the level of the road, and whose excavation is not necessary in the construction of the road, belong to the owner of the land condemned. Where, by the right of eminent domain, a railroad company constructs an underground railroad through the land of another, the minerals excavated from the land, except those in such land as are necessary in the building of the road, belong to the owner of the soil. Therefore, coal so excavated does not belong to the company, but belongs to the owner of the fee. Such owner has a right to dig these minerals,

<sup>93</sup> Barr. & Ad. M. & M., p. 183 and note, citing Kan. Gen. Stats. 1889, Secs. 3,840, 3,842; Ohio Act April 13, 1894.

<sup>94</sup> 124 Ind. 329 (1890).

<sup>95</sup> 2 Metc. (Ky.) 482 (1859).

<sup>96</sup> 5 Watts (Pa.) 546 (1836).

provided he do not interfere with the rights of the company; that is, he must leave sufficient support for the road. For such limitation upon his right to mine, the owner of the fee is entitled to compensation when the damages of the land condemned are estimated. The company may, however, enter into special arrangements with the owner of the soil and waive the right for the support of its road, and may agree to remove its road when the mining operation necessitates it and when notified by the owner of the soil to do so. Such an agreement is perfectly legal and enforceable in law.<sup>97</sup> This is the prevailing rule. In Nevada, provision is made by statute that the owner of the soil shall not mine under or upon the land belonging to a railroad company without the company's consent.<sup>98</sup>

### MINING LEASES

**29. Definition and Nature.**—The term **mining lease** is used to include all grants and conveyances for the purpose of working the mines on the land, whether the grant be in strictness a lease or not. Practically, a lease of mines is in substance a sale by the lessor to the lessee of the minerals that the latter shall dig within the period during which the lease operates. It is a liberty given to a particular individual for a specified length of time, to go into and under the land and get certain things there if he can find them, and to take them away just as if he had bought so much of the soil.<sup>99</sup>

It is entirely competent for the owner of the fee to grant a lease of the minerals under the surface of his land.<sup>100</sup> A grant of the minerals in, upon, or under the land, either specially named or designated by general terms with the right to go upon the land and occupy the same, with the right also to construct such things as may be necessary

<sup>97</sup> 29 Mo. 141 (1859); 5 Watts (Pa.) 546 (1836); 146 Pa. 130 (1892); 86 Pa. 468 (1878).

<sup>99</sup> 22 Q. B. Div. (Eng.) 318, 327 (1889); L. R. 8. A. C. (Eng.) 641, 650 (1883).

<sup>100</sup> 140 Mo. 23 (1897).

<sup>98</sup> Nev. Gen. Stats. 1889, Sec. 887.

and useful for the full enjoyment of the advantages of the grant, together with the right to search for, dig, work, win, and carry away minerals, for a specified period, with the recompense of rent, is a lease.<sup>101</sup> The mere form of the instrument is not necessarily conclusive as to whether the grant be a lease or not; whatever words are sufficient to explain the intention of the parties that one shall divest himself of the property and the other come into it for a determinate time will, in the construction of the law, amount to a lease.<sup>102</sup> Thus, an instrument which conveys to the grantee the exclusive right to enter upon the lands and dig and mine phosphate rock, and other minerals to any extent he may require, and carry away and sell the same for his own use, for a fixed period on a certain royalty, is a lease and not a license to mine.

### 30. Distinction Between a Lease and a License.

It is often necessary to determine whether a certain grant be a lease or a license, in order to ascertain the respective rights of the parties. The law on the subject is not altogether harmonious, but the principles that can be fairly deduced are herein stated. It has been said that a lease is a contract for the possession and profits of the land for a specified period, with the recompense of rent; in fact, a grant of an interest in the land. A license is a mere right to dig, and conveys no interest either in the land, or the minerals in place. A contract simply giving a right to take ore from a mine, no interest or estate, either in the land or in the mine being granted, merely confers a license.<sup>103</sup> In a lease, the grantee has exclusive right as well as possession. The grant amounts to a conveyance of all the minerals the grantee can mine and remove during his term, giving him full proprietorship therein. In the case of a license, the licensee usually does not get exclusive right to mine, as we have heretofore explained. A lessee, however, has the exclusive privilege of mining, within the terms of his lease.<sup>104</sup>

<sup>101</sup> 47 Ind. 105 (1874); 9 Kulp (Pa.) 136 (1897); see *sub*title Tenant for Years *supra*.

<sup>102</sup> 6 Watts (Pa.) 362, 368 (1837).

<sup>103</sup> 29 N. J. Eq. 228 (1878).

<sup>104</sup> 85 Fed. Rep. 907 (1898).

The supreme court of Pennsylvania has held the difference between a lease of mines and a license to work mines to be that the former is a distinct conveyance of an actual interest or estate in lands, while the latter is a mere incorporeal right to be exercised in the land of another. It is a right to carry away the minerals from the land, and may be exercised apart from the possession of the land. In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee have acquired by it an estate in the land, giving him a right to recover possession against any one who should dispossess him of the land. If the land be still considered in the possession of the grantor, the instrument will only amount to a license, and though the licensee will certainly be entitled to search and dig for minerals according to the terms of the grant and appropriate the product to his own use, on the payment of the stipulated rent or proportion, yet he will acquire no property in the minerals till they are severed from the land and have thus become personal property. In the coal-mining districts of Pennsylvania, leases for terms of years are very common. They are estates in land. The rent is usually measured by the tons taken, but the tenant is bound by a minimum production annually, and the transaction amounts to a sale, at a price per ton, of the coal on the premises, and constitutes an interest in the lessee in the nature of a corporeal hereditament.<sup>105</sup>

**31. What a Lease Covers.**—It has been explained that a tenant whether for life or for years has the right to work open mines, but that he has no right to work unopened or new mines. A grant of land, together with the mines thereon, will entitle the grantee to work mines even though they be unopened, as otherwise the grant of the minerals will have no effect. Where, however, the land contains open and unopened mines only, the open mines will pass by such a grant, not the unopened mines. In England, it is held that where the land can only be used for mining

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<sup>105</sup> 53 Pa. 229, 244 (1866).

purposes and is of no value otherwise, the grantee will have a right to work the mines whether open or new on the land, especially if, at the time of the demise, the land were used for mining purposes.<sup>106</sup> To give the tenant full right to work open and new mines on the demised premises, he ought to be given the express authority to dig minerals, and to win and work new mines and appropriate the minerals to his own use.

It often becomes necessary to determine what minerals the lease includes. Where by the terms of the lease the privilege of the lessee is to mine a certain mineral only, as, for example, to mine for soapstone, the lessee has of course no right to mine other minerals. For example, where land was leased to manufacture salt, it was held that, as salt only was granted by the lease, the lessor retained the ownership of all the rest of the land.<sup>107</sup> Where, however, in raising salt water, the lessee raises petroleum as an inseparable incident, the severance of the petroleum is a necessary act of the lessee in the exercise of his right of manufacturing salt. There is, however, a considerable diversity of opinion whether the lessee be bound to pay to the lessor for the petroleum or not, the prevailing opinion being that he should pay for it a fair price, less the expense of severing the oil from the salt. He would not be in the position of a wrongdoer, but of a purchaser.<sup>108</sup>

A grant or reservation of all the oil and gas in or under a certain tract of land, with free mining privileges and the like, includes only the oil and the gas on the land. The phrase *mining privilege*, used in the grant, has reference only to the oil or gas, and applies to the processes and means of obtaining the oil, but does not extend to coal, iron, or other substances in the land, not named in the grant.<sup>109</sup> Where the lease is of all minerals, without other description, then generally all the minerals found in the land, whether found before or after the lease were executed, will be included in the lease. Thus, where there is a reservation

<sup>106</sup> 3 J. & La T. (Eng.) 397, 410 (1846).

<sup>107</sup> 7 North. Co. Rep. (Pa.) 113 (1899).

<sup>108</sup> 41 Pa. 357 (1861); 101 Pa. 452 (1882).

<sup>109</sup> 145 Pa. 571 (1892).



of "all minerals and magnesia of every kind," it includes a chromate of iron afterwards found in the land.<sup>110</sup> A lease or reservation of minerals, without more, would also include the stone, such as granite which is worked by quarrying. In England, the law seems to be that quarrying would not be included under a lease of the minerals of the land, unless there be something to indicate that such was the intention of the parties.<sup>111</sup>

**32.** There are certain circumstances, however, when the term *minerals* will not be held to be so comprehensive as is above indicated. Thus, a grant or reservation of "minerals and ores" in certain land will be held not to include granite found on that land, where the context clearly indicates that the parties had in view such minerals as are gotten by underground and not open working. Such is the case where a grant is made of all minerals and ores with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores; also, the right of ingress and egress for mining purposes, and to make explorations for minerals and ores.<sup>112</sup>

The test of what the term minerals includes in a lease or a reservation seems to be this: Are the substances minerals in the sense that they form or belong to a class or kind of substances, of which it can be said that when separated from the soil they are valuable either for the purpose of sale or for some other purpose? If so, they are minerals included in the lease or in a reservation. Apart from any mere test of value one must say that coal is one of the most familiar examples of what is meant by a mineral. Thus, it is held that a reservation of all mines within or under a certain piece of land includes a certain stratum of red rock and a layer of coal, although these substances could not be mined at a profit. They are substances which have a use

<sup>110</sup> 5 Watts (Pa.) 34 (1836).

<sup>112</sup> 147 N. Y. 495 (1895).

<sup>111</sup> 147 N. Y. 495 (1895); 15 A. C. (Eng.) 19, 27 (1889).

and a value of their own, independent and separate from the rest of the soil.<sup>113</sup>

**33.** Where a conveyance reserved "all mines and ores of metals that now are or hereafter may be found on the land," and the only valuable minerals found in that portion of the country was iron, it was held that the reservation did not include quarries or deposits of marble, serpentine, or other building material, which were not known to exist in the neighborhood when the reservation was made. The principal consideration in the minds of the parties was iron ore. At most, they could only have meant mines and ore of metals in common use and commonly known as such.<sup>114</sup> And where the conveyance granted one-half of the stone coal of a certain tract, except the minerals of all the precious kinds, it was held that the conveyance included one-half of the coal and all of the minerals on the tract, and did not include the minerals of the precious kinds.<sup>115</sup>

A lease of the minerals, or the mines within or under the land, includes only what may be called the natural formation in and on the land; not artificial formation, such as mounds of refuse or waste. Heaps of waste therefore belong to the lessor, and the lessee has no right to appropriate such substances. Thus, the lessee of certain mines was given exclusive right to all iron ore on certain lands including the right to wash such ore as needs washing. The refuse accumulated from such washing, collected at a certain dam, subsequently became commercially valuable, and sold as a material called ocher. It was decided that this ocher did not belong to the lessee but to the lessor. Such substance is not ore within the contemplation of the lease.<sup>116</sup>

A lease of coal mines contained a provision requiring the lessee to pay to the lessor a certain royalty on all coal mined from the premises "that will pass over a five-eighths of an inch mesh." It also provided that the lessor should "have

<sup>113</sup> (1899) 2 Ch. (Eng.) 190.

<sup>114</sup> 89 Mich. 180 (1891).

<sup>115</sup> 90 Tenn. 619 (1891).

<sup>116</sup> 20 W. N. C. (Pa.) 278 (1887); 140 Pa. 147 (1891).

all culm or refuse coal from the mines." At the time the lease was made, there was not a general market for coal too small to pass over a five-eighths of an inch mesh, such as pea and buckwheat coal. Such coal was dumped on the culm or refuse pile, but subsequently it became commercially valuable. It was held that the lessor was entitled to only such culm or refuse coal as the lessee rejected and placed upon the refuse pile, and not to such pea and buckwheat coal as would pass through a mesh of five-eighths of an inch and which the lessee chose to sell.<sup>117</sup>

**34. Working by Instroke and Outstroke.**—Working by **instroke** is working coal or other minerals on the demised premises by or through pits or shafts sunk in adjoining lands held by the lessee through a different lessor. Working by **outstroke** is conveying minerals from an adjoining mine to the surface through the pits or shafts from the demised mine.<sup>118</sup>

Where the lessee of a mine is the owner or lessee of an adjoining mine, the question of his working by instroke or outstroke may be very material. This question may arise if the adjoining mine have already been worked and have a shaft sunk in the adjoining land. If coal or other minerals from the demised mines could be conveyed to the surface through the shaft in the adjoining land, it would obviate the necessity of sinking a new shaft on the demised premises and thus save the outlay of a large sum of money. The same importance is attached to conveying the products of an adjoining mine through the shaft of the demised mine. In the absence of anything appearing to the contrary, the lessee has the right to work by instroke. To work the mine by instroke is working in a skilful and workmanlike manner within the terms of the lease.<sup>119</sup> On the contrary, a lessee may not work by outstroke unless he be entitled to so do by some provision in the lease. Such a right is not incident to the working of the demised mines. And the mere fact that

<sup>117</sup> 163 Pa. 84, 98 (1894).

<sup>119</sup> L. R. 5 Ch. (Eng.) 103 (1869).

<sup>118</sup> 10 W. R. (Eng.) 315 (1862).

he has the right to convey minerals from a particular mine through the shaft of the demised land will not give him the right to convey minerals from any mine through the demised mine and shaft.<sup>120</sup>

**35. Duties of the Lessor.**—A lessor often covenants that the lessee shall have the quiet enjoyment of the mines leased without any molestation, interruption, or disturbance from the lessor, or any one claiming under him. Any act of his destroying the leased mine, or causing damage to the same, or rendering the working of the leased premises impracticable, is a breach of this covenant for which the lessor is liable. Thus, where the lessor leased certain mines to the lessee, covenanting that the lessee should have the quiet enjoyment of the mine, and subsequently excavated a quarry of stone situated over the demised mine, causing the roof of the mine to fall in and rendering the work therein impracticable, he is liable for a breach of the covenant for quiet enjoyment.<sup>121</sup>

If the working of a mine, situated under or over the demised mine, cause irreparable damage to the demised mine, the lessor will be prevented from working the same.<sup>122</sup> Where a person leased certain alum mines, it was held that in working certain coal mines situated beneath the alum mines, the lessor, or his lessee under a later lease, could not remove the pillars in such lease, if by so doing the alum mine would be destroyed.<sup>123</sup> Where, however, the working of the mine by the lessor would not ordinarily do any injury to the demised mine, but during the course of the operation by the lessor a feeder was struck with the result that a large body of underground water, the existence of which was unsuspected and the nature of which was uncertain, flooded the demised mine, causing considerable damage, it was not an interruption within the contemplation of the parties in making the covenant against interruption.<sup>124</sup>

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<sup>120</sup> L. R. 1 App. Cas. (Eng.) 701 (1876).

<sup>121</sup> 2 H. & N. (Eng.) 857 (1858).

<sup>122</sup> L. R. 23 Ch. D. (Eng.) 87 (1882).

<sup>123</sup> 3 H. L. Cas. (Eng.) 25 (1850).

<sup>124</sup> (1891) 2 Q. B. (Eng.) 680.

**36. Duties of the Lessee.**—Where there is no clause in the lease providing that the lessee sink a pit in the demised mine, and the lease only provides that the mine be worked in a proper and workmanlike manner, the working of the demised mine by instroke is not improper. The lessee is not compelled to sink a shaft or pit on the demised premises if he can work the demised mine from the adjoining mine, even though it do not belong to the lessor. A covenant in the lease that the lessee deliver up the mine at the expiration of the lease in such a condition that the coal may be continued to be worked, does not mean that the lessee must sink a shaft on the demised premises, if he can work the mine by instroke. This is so even if the lessor, in order to continue working the mine after the lessee delivers it, would have to sink a shaft on the premises.<sup>125</sup> A covenant giving the lessee the privilege to sink shafts on the premises does not compel him to do so, if he can work the leased mine by instroke.<sup>126</sup> Where, however, the lessee has covenanted to work the mine and it is impossible for him to work by instroke, or, where there is a provision in the lease that he shall not work by instroke, he is under obligation to sink a shaft on the demised premises, if there be not one already in existence.<sup>127</sup> Where the lessee has covenanted to sink a shaft to a certain depth to find marketable coal, and, if he should find the same, to pay the lessor a certain amount, if the lessee fail to sink this shaft, he is liable to pay to the lessor what the latter had lost because the shaft was not dug, provided it can be shown that marketable coal could have been found had the shaft been dug.<sup>128</sup>

**37.** Generally, in the absence of an agreement on the part of the lessee to work the leased mine, he need not work the mine, if he do not choose to do so. Especially is this the case where the lessee has covenanted to pay a certain fixed rent to the lessor, usually designated as *dead rent*. If he pay this dead rent, the lessor cannot compel

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<sup>125</sup> L. R. 6 Ch. (Eng.) 742, 756 (1870).

<sup>126</sup> L. R. 5 Ch. (Eng.) 103, 104 (1869).

<sup>127</sup> 7 Exch. (Eng.) 170, 178 (1852).

<sup>128</sup> 10 Exch. (Eng.) 766 (1855).



him to work the mine in order to pay the royalty, that is, the rent per ton for the minerals actually mined, a manner of payment almost always provided for in mining leases.<sup>129</sup> The fact that the demised land can be used only for mining purposes, and that it was probably the intention of the parties to the lease at the time it was made that the leased mines should be worked, is not a sufficient ground to compel the lessee to work the mine, if the lease do not contain any agreement by the lessee to that end.<sup>130</sup> Moreover, the law in England seems to be that a covenant on the part of the lessee to pay a certain royalty on all minerals mined will not be construed to amount to an undertaking on the part of the lessee to work the mines leased. So long as the lessee mines, he is bound to pay the specified royalty, but he cannot be compelled to work such mine. If the lessor want to be assured of getting a profit from the leased mines, he must either provide that the lessee shall mine a certain minimum amount of the mineral annually, or that the lessee pay a dead rent besides the royalty.<sup>131</sup> In the United States, the rule is, that where the lessee covenants to pay a royalty on the minerals worked from the leased mine, there is an implied covenant that the lessee shall work the mine with ordinary diligence. Were the law otherwise it might easily be a hardship on the lessor. He might not enjoy any profit from the lease, nor, on account thereof, be able to work the mine himself.<sup>132</sup> Where, however, the lessee covenants to work the demised mine, he is bound to do so. If he covenant that he shall and will, during the term of the lease, work the mine in the most proper and effectual manner, with a reasonable number of able-bodied men, he is bound to continue to work the said mine.<sup>133</sup> And where he covenants to dig a shaft on the demised land, and mine the coal thereunder and pay a royalty to the lessor, the royalty being only a consideration of the lease, the lessee has no right after sinking a shaft to use the shaft exclusively for

<sup>129</sup> L. R. 9 Eq. (Eng.) 536 (1869).

<sup>130</sup> L. R. 6 Ch. (Eng.) 742 (1871).

<sup>131</sup> L. R. 9 Eq. (Eng.) 536 (1869).

<sup>132</sup> 39 N. C. 31 (1883); 141 Pa. 185, 199 (1891); 93 Pa. 434 (1880).

<sup>133</sup> 42 L. T. N. S. (Eng.) 80 (1879).

the purpose of mining coal from an adjoining mine, while the leased mine remains neglected. The lessor has a right to demand that the lessee shall prosecute the mining of the coal upon the land with reasonable diligence.<sup>134</sup>

38. The doing of any work necessary to the proper and convenient use of the mine or quarry, such as the removal of earth, débris, water, ice, or snow, would seem to be working the mine or quarry as truly and usefully as the blasting and removing of the mineral products, for the latter cannot be done unless the quarry or mine be kept free from obstructions. A coal mine is worked for the purpose of obtaining coal; but gangways are to be made, slate removed, and drainage secured, before mining can be successfully done. While this work is in progress, with the pumps moving day and night, the operator is doing the necessary—the only possible—work in his mines, and is working them as a matter of fact and law. A lease of a slate quarry provided that if the lessee do not work the quarry for three successive months, the lease shall be forfeited. It was held that where the lessee was engaged in the removal of water, débris, and ice, which had filled the quarry in consequence of a heavy flood, and this work had to be done in order to reach and work the slate in the quarry, he was engaged in the quarry within the meaning of the lease just as much as blasting and raising the slate would be.<sup>135</sup>

Where the lessee has covenanted to work the mine and it has become exhausted, he will not be guilty of a breach of the covenant if he do not work such mine. The same is the case if no minerals, such as described in the lease, are to be found in the demised mine.<sup>136</sup> Where, however, the lessee, without any qualifications, covenants to work the mine, he is not justified to discontinue working it on the ground that he can no longer secure sufficient coal or other minerals to pay for the working of it. This might be so, and yet the most valuable portion of the mine remain untouched. It

<sup>134</sup> 53 Iowa 550 (1884).

<sup>135</sup> 129 Pa. 81, 93 (1889).

<sup>136</sup> 70 Ill. 527 (1873); 43 L. T. N. S. (Eng.) 197 (1880); L. R. 5 C. P. (Eng.) 577, 585 (1870).

might be the result of the peculiar state of the market, and in nowise attributable to the difficulties in mining. There is nothing in the covenant which authorizes a suspension or abandonment of mining because it has become unprofitable.<sup>137</sup> If the lessee's covenant to work the mine be qualified in some way, as, for instance, to get the mineral to the fullest practicable extent, or to work the mine so long as it is "fairly workable," or "fairly wrought," or to work coal seams "workable as coal seams," then he is only bound to work the mine if there be sufficient minerals in the mine and it can be so worked as to secure a profit to him.<sup>138</sup> At all events, he will not be obliged to work the mine when the covenant is so qualified, unless the minerals can be fairly gotten, according to the mining usage, without extraordinary difficulty and expense.<sup>139</sup>

**39.** It is frequently provided in the lease of a mine that the lessee shall dig and remove a certain amount of the minerals annually. Especially is this provision present when the rent to be paid is in the shape of royalties, that is, so much rental per ton of the minerals mined. In such a case, the lessee is not bound to produce that amount of the mineral, if there be no mineral in the demised mine, or if the mine have become exhausted.<sup>140</sup> And where the lease stipulates to produce a minimum amount of coal and to pay a stipulated royalty, and the lessee has paid the designated minimum royalty for several years, but the fact is afterwards ascertained that there is no coal on the land, the lessee cannot recover the money he so paid, the payments having been made to avoid a forfeiture.<sup>141</sup> If the lessee's covenant be to absolutely raise, that is, to get or win, a given quantity of coal each year, or to pay a minimum rent which should represent the minimum amount of coal agreed to be worked, and he fail to raise the stipulated quantity of coal, he is bound at all events to pay the minimum rent; and this is so whether there be any coal in the mine at all.

<sup>137</sup> L. R. 17 Eq. (Eng.) 358, 370 (1873).

<sup>138</sup> 7 C. & P. (Eng.) 346 (1836); L. R. 3 Ch. (Eng.) 524 (1868).

<sup>139</sup> 1 H. & N. (Eng.) 237 (1856).

<sup>140</sup> L. R. 5 C. P. (Eng.) 577, 585 (1870).

<sup>141</sup> 68 N. W. Rep. 570 (1869).

He is not excused from paying the stipulated rent, whether in shape of dead rent or of a minimum royalty on the ground that the mine has become exhausted.<sup>142</sup> In case the mine has not become exhausted, the covenant that the lessee shall work a certain amount of the mineral every year is operative and binding on the lessee. In such a case, the lessee will not be relieved from working the mine on the ground that the mineral cannot be worked profitably.<sup>143</sup> As a general rule, if the cost of working the mineral be more than the worth of the mineral gotten, all that the lessor can demand is his royalty per year, during the period of the lease, for the minimum amount of the mineral which the lessee has undertaken to work. Where, in such a case, the lessee of a coal mine offers to pay the stipulated royalty to the lessor for all the coal that remains in or under the demised land, that is all the lessor can demand, and the court will not compel the lessee to go on working the mine at a loss, perhaps with ruinous results to the lessee.<sup>144</sup> Where the lessor has accepted from the lessee the royalty for the minimum amount which the lessee is, under the lease, bound to work, he cannot afterwards enforce the covenant against the lessee for not working the stipulated amount. An acceptance, however, of dead rent from the lessee without exacting from him the royalty for the coal which, under his covenant, he is bound to produce and which he failed to produce, cannot be considered as discharging the lessee from his obligations under this covenant to work the mine.<sup>145</sup>

**40. Manner of Working.**—If, by the terms of his lease, the lessee be in no respect restricted as to the manner of working the mine, he may conduct the work in any manner he sees fit, either by himself, his servants, agents, or assignees.<sup>146</sup> Ordinarily, however, the lease contains a covenant on the part of the lessee to work the leased

<sup>142</sup> L. R. 5 C. P. (Eng.) 577 (1870); 13 M. & W. (Eng.) 487 (1844); 1 H. & N. (Eng.) 195 (1856).

<sup>143</sup> 7 B. & S. (Eng.) 243 (1866).

<sup>144</sup> 13 M. & W. (Eng.) 487 (1844); 1 H. & N. (Eng.) 195 (1856).

<sup>145</sup> 13 M. & W. (Eng.) 194 (1844); 54 Pa. 32 (1867).

<sup>146</sup> 1 Strob. Eq. (S. C.) 90 (1845).

mine in a proper and workmanlike manner, or words to that effect. A covenant that the lessee shall work the mine in a proper and workmanlike manner does not mean that he shall work it to the best advantage of the lessor. It means that the lessee shall work in such a manner as shall not be simply an attempt to get out of the earth as much of the minerals as can be got for the particular purpose of the lessee, regardless of any ordinary or workmanlike proceeding. Where a coal-mine lease contained a covenant similar to what we have described, and the leased mine consisted of three seams, one under the other, it was held that working the mine in such a manner as not to work the upper seam at all, and working the middle seam after the lower one, was not a breach of the covenant. This is not a covenant not to work any of the seams, unless all the seams be worked. The only covenant present is to work all; but the right to work any one of the seams is included in the lease.<sup>147</sup> A stipulation in the lease of a quarry shaped like a horseshoe, that the quarry shall be worked "as the face is now opened," is not violated by quarrying one of the faces to a greater extent than the others, if the same general shape of the quarry be preserved. The covenant only compels the lessee to work as the face appears to be opened, but does not oblige him to work every part of the face to the same extent.<sup>148</sup>

The lessee under a lease of coal mines was granted the privilege of going on a certain farm and mining and taking out all the coal he could reach beneath the surface. He covenanted to mine in such a manner as to do the least possible damage to the land. This covenant did not mean that the lessee was limited to making only one opening in the land and getting so much coal as could be reached therefrom. It was, therefore, held that the lessee was not guilty of a breach of the covenant as to the manner of working by filling up the first opening he had made on the land, after all the coal that could be got from there with

<sup>147</sup> L. R. 5 Ch. (Eng.) 103 (1869); L. R. 17 Eq. (Eng.) 539 (1873).

<sup>148</sup> 21 N. J. Eq. 27, 29 (1870).



profit had been gotten, and making another opening near the first. The right to make the necessary openings would necessarily follow the right to take the coal within the designated boundaries.<sup>149</sup>

41. In a lease that contains a covenant that the lessee shall not remove the pillars from the mine without the consent of the lessor, the covenant must be carried out, and under no circumstances can any of the pillars, which are necessary for the support thereof, be removed; and the courts will stop the lessee from so removing them.<sup>150</sup> If the pillars be removed by the lessee contrary to the covenant, and the surface of the land be damaged thereby, caused by cracking and subsiding in consequence of the want of sufficient pillars to support the roof of the mine, the lessee is liable to the lessor or to his successor in title for the damage so resulting. The fact that he has worked the mine in a usual and workmanlike manner will not alter his liability under the covenant above mentioned.<sup>151</sup>

Provision is often made in mining leases that the lessee shall give up the mine at the end of the term in a good and workmanlike condition. In case such a covenant be present in the lease, the lessee cannot remove the posts and pillars left standing for the support of the roof of the mine. It is evident that if the roof fall in, in consequence of the removal of the pillars and posts, the mine could not be delivered to the lessor by the lessee in a good and workmanlike condition. The lessee cannot remove the posts and pillars even after the mine has become exhausted. This covenant cannot be controlled by a custom among the miners that after the mine is exhausted the pillars and posts are removed.<sup>152</sup>

The lessee of a mine is not entitled to artificially conduct water from an adjoining mine into a demised one. Nor will he be allowed to work the mine in such a way as to probably cause the mine to be drowned. Where a lease contained a covenant that the lessee shall work the mine in

<sup>149</sup> 83 Pa. 144, 146 (1876).

<sup>150</sup> L. R. 23 Ch. D. (Eng.) 589 (1881).

<sup>151</sup> 18 C. B. N. S. (Eng.) 332 (1865).

<sup>152</sup> 44 Iowa 327 (1876).

a sound, safe, and workmanlike manner, so as not to ruin the said works, if the lessee, or his successor in title, permit the mine for a long time to be filled with water, so that the mine is greatly damaged, he is guilty of breach of covenant.<sup>153</sup> The word *ruin* as used in such a covenant is not confined to an utter destruction of the works, but includes any serious impairment of the works and anything which would essentially promote their injury, decay, or destruction.<sup>154</sup>

**42. Rents and Royalties.**—The **rent** is the money consideration of the lease. In mining leases, it is usually paid in one of two ways. There is what is called *dead rent*, which is a certain fixed sum payable at regular intervals, annually, as a rule. The other method is to pay a **royalty**, a variable sum which depends on the amount of minerals gotten. A provision in the lease that the lessee shall pay to the lessor so many cents for each ton of coal raised by him, is a provision for the payment of a royalty.<sup>155</sup> Sometimes both kinds of rent are provided to be paid; that is to say, in addition to the provision that the lessee shall pay for what is actually mined, the lease contains a covenant on the part of the lessee to pay a certain fixed sum annually.<sup>156</sup> The purpose of reserving such a rent, usually called *dead rent*, is that the lessor may have some security that the mine will be worked, as it is a dead loss to the lessee if the mine be not worked. It is also security that the duration of the lease will be limited to the time in which all the minerals will be raised, because, after the mine is exhausted, the money rent is again a dead loss.<sup>157</sup>

**43. Payment of Dead Rent.**—Where *dead rent* is reserved the lessee cannot refuse payment thereof by showing that he cannot work the mine at a profit. All mines are liable to have faults.<sup>158</sup> Where the lessee covenants to pay a minimum rent to the lessor and a certain royalty besides, if more than the amount of coal is raised to make up the

<sup>153</sup> L. R. 6 Ch. App. (Eng.) 758 (1869); L. R. 5 Ch. App. (Eng.) 103 (1869).

<sup>154</sup> 13 Ill. 210 (1890).

<sup>155</sup> L. R. 8 App. Cas. (Eng.) 767 (1883).

<sup>156</sup> 53 Fed. Rep. 988 (1893).

<sup>157</sup> L. R. 1 C. P. (Eng.) 11, 34 (1865).

<sup>158</sup> 16 Beav. (Eng.) 252 (1852).

fixed rent, until the coal mine becomes exhausted, he cannot refuse to pay the minimum rent on the ground that he can no more work the mine at a profit. This is a covenant to pay dead rent, not a covenant to work the mine. If he have paid the rent, he may, if he think fit, decline working altogether.<sup>159</sup> The lessee will not be relieved from paying the annual minimum rent on offering to pay the lessor for all the coal that remains on the premises, even though the exhausting of the mine cannot be accomplished except at a ruinous cost to the lessee.<sup>160</sup> It seems, however, that if, in the course of working, the lessee reach an ancient working, that is, a place in the seam which had been worked many years before and had been thus wholly exhausted, the lessee will be excused from paying further rent. But the mere finding of a natural fault will not excuse the lessee from paying the minimum rent provided in the lease, although the working of the mine has become unprofitable. Moreover, the lessee cannot be relieved from paying this rent on the ground that the ore found in the demised mine is not merchantable.<sup>161</sup>

If the lessee have covenanted to pay a certain royalty for all coal mined, and have further covenanted to pay not less than a certain amount annually whether coal be mined or not, he will not be relieved from paying the minimum rent by showing that he had in previous years paid more than the value of all the coal on the premises at the stipulated royalty. He is bound to continue paying the minimum rent so long as he continues in possession of the premises.<sup>162</sup> In the absence of a provision to the contrary, the lessee is bound to pay each period the stipulated royalties, and is not entitled to have deducted therefrom the amount in any previous year paid to the lessor, in the shape of dead rent, above the royalty for the minerals actually worked.<sup>163</sup> Usually, however, an *average* or *shorts* clause is inserted in the lease. This clause provides that where an excess over the actual royalties is paid in any year, it shall be deducted

159 7 C. & P. (Eng.) 335 (1836).

160 9 Sim. (Eng.) 519 (1839).

161 21 Mo. App. 58 (1886).

162 177 Pa. 387 (1896); 37 Ohio St. 469 (1882).

163 14 M. & W. (Eng.) 259 (1845).

from the royalties of the following year if they amount to more than the minimum rent payable for that year. Such allowance is usually limited to the following year only, and leaves the dead rent payable in any event.<sup>164</sup>

44. It has already been stated that where the lessee covenants absolutely to raise a given quantity of coal each year, or to pay a certain rent which should represent the minimum amount of coal agreed to be worked, he is bound to pay the stipulated minimum rent whether there be any coal in the mine or not. He is not excused from paying the stipulated rent on the ground that the mine has become exhausted. The rule in England seems to be that such a covenant binds the lessee even if there never were any mineral of the kind described in the lease on the demised land. So, where the lessee covenants to pay a certain rent annually besides certain royalties, and the lease comprises a certain vein or seam of coal on the demised land "about two feet thick," the lessee will not be excused from paying the dead rent on the ground that he has made a search and could not find any coal, especially where the search he instituted was shown to be very insufficient.<sup>165</sup> In the United States, the law in this regard is not in harmony. Where the lessee took a lease of a disused mine with its machinery, the history of which was well known in the neighborhood and to the lessee, and he agreed to work the mine and pay a minimum rent annually, and pursuant of this lease he entered the mine, and, after experimenting, concluded that the mine was destitute of ore, he was held liable to pay the minimum rent annually. In the absence of any misrepresentation or fraud, the lessee is not justified in refusing to pay the rent on the ground that the mine contained no ore.<sup>166</sup>

However, the prevailing rule is that, where the lease is for the purpose of exploring for and mining certain ores, which are, or which may be found in or under the demised land, the existence of the ore is presupposed, and if, after reasonable

<sup>164</sup> 177 Pa. 387 (1896).

<sup>165</sup> L. R. 4 Ch. D. (Eng.) 448 (1876).

<sup>166</sup> 33 Fed. Rep. 678 (1887); 53 Fed. Rep. 988 (1893).

effort on the part of the lessee, no ore be found, the lease fails and no rent can be collected. The scheme of mining leases implies that ore exists in mining quantities, and, if it do not, the scheme fails.<sup>167</sup> The general rule in the United States seems, also, to be that when the mine has been exhausted, the lessee is thereafter not liable for the minimum rent specified in the lease.<sup>168</sup> It has, however, been decided in Pennsylvania that where the mining lease amounts to a sale of the coal in the mine, the exhaustion of the mine will not operate as relieving the lessee from paying the stipulated minimum annual rental. In that case, the existence of workable, marketable coal under the land had been demonstrated by the lessee in sinking a shaft. The only element of uncertainty—the quantity—he took the risk of, by an unqualified covenant to pay a fixed minimum rent. He must therefor pay that rental even if the quantity of coal were smaller than he anticipated.<sup>169</sup>

**45. Payment of Royalties.**—The meaning of the term royalties in connection with mining leases has already been explained. The usual provision as to the payment of royalties is that the lessee shall pay to the lessor so much for every ton of the mineral mined by the lessee. Often the method adopted in computing the royalties is different. Certain leases provide that the lessee shall pay to the lessor a certain share of all such sums of money as the coal shall sell for at the pit's mouth. Where such is the provision of the lease, the lessee cannot be compelled to pay the lessor any share of the money produced by the sales of the coal elsewhere than at the pit's mouth.<sup>170</sup> Where the lessee covenants to pay one-third of the money that should arise from the sale of the coal mined, and he also covenants to keep a true account of all the coal raised daily, the rent is to be calculated from the amount of the coal sold and not from the amount of money collected.<sup>171</sup> A lease of a colliery stipulated for the payment by the lessee as a royalty of a

<sup>167</sup> 46 N. J. Law 151 (1884); 28 N. W. Rep. 427 (1896).

<sup>168</sup> 176 Pa. 282 (1896).

<sup>169</sup> 158 Pa. 606, 615 (1893).

<sup>170</sup> 7 T. R. (Eng.) 677 (1798).

<sup>171</sup> 7 C. & P. (Eng.) 340 (1836).



certain share of the amount for which the coal shall sell for "at the breakers." By a universal custom or usage, the selling price at the breakers means the actual selling price at the place of delivery, less the costs of selling, including commission for selling and the freight charges. It was held that the lessee was entitled to deduct from the selling price the commission which the lessee had to pay to an agent to procure a contract to sell the coal to a certain purchaser.<sup>172</sup> Where the lease requires the lessee to pay a certain stipulated royalty for each ton of mineral he may have mined, taken, or removed from the said premises, it does not mean that the royalty is not due until after the mineral has been shipped away from the mine. The words *mined*, *taken*, and *removed* are used nearly in the same sense, that is, in the sense of being gotten or produced from the mine, and the royalty on the same is due as soon as the mineral is mined.<sup>173</sup> An agreement to pay a certain royalty per ton of coal, *miner's weight*, means such quantity of coal as is computed to be a ton in paying the miner who mines by the ton.<sup>174</sup>

The contract frequently is that the royalty shall be paid in the shape of a certain amount of the coal or mineral mined, the royalty occasionally taking the shape of paying to the lessor a certain amount of the mineral yearly. Where such an agreement is present, the lessee is bound to deliver that much of the mineral so long as minerals of that description are in the mine. He will not be relieved from this obligation on the ground that there is not enough of the mineral left in the mine to make it worth the mining. It seems, however, that it would be sufficient excuse if no minerals at all were left in the mine.<sup>175</sup> The lessee is bound to give account to the lessor under such a lease, of the coal he has mined, and, as a rule, the lessor has a right to inspect the mine so as to see the way the lessee has pursued his mining operations and ascertain the amount he has mined. In Ohio, it is provided by statute that the lessor has the right to

<sup>172</sup> 177 Pa. 405 (1896).

<sup>173</sup> 41 Pac. Rep. 1,087 (1895).

<sup>174</sup> 157 Pa. 17, 33 (1893).

<sup>175</sup> 7 B. & S. (Eng.) 243 (1860).

examine the machinery by which the coal is weighed and also the right to examine the accounts of the amount of coal mined. When the lessee makes monthly accounts of the amount of coal raised, according to the stipulation of the lease, and the lessor receives the accounts without any objections and receives payments on the basis of these reports, they are considered in the law to be correct reports and are conclusive between the parties, unless clear proof be made that they are false and fraudulent. If there be any irregularity or cause of complaint in these reports, it is the duty of the lessor to make known his objections at the time he receives the reports and the payments on them as a basis.<sup>176</sup>

**46. Assignment of Mining Leases.**—The law that governs the assignment of leases generally is applicable to the assignment of mining leases. In the absence of anything to the contrary in a mining lease, the lessee may assign his interest to another. The assignee by such transfer assumes all the responsibilities and covenants of the lease toward the lessor, from the date of the assignment, but not prior thereto. Besides, ordinarily, the assignor still continues liable to the lessor for the performance of all the covenants under the lease. But the assignee has no power to enforce the covenants his assignor has entered into with the lessor. He succeeds only to the rights the original lessee had under the lease, and is bound, instead of the lessee, by its obligations; he has no right to insist upon any obligation between the lessor and lessee. An assignment of a mining lease with the goodwill of the trade, does not carry with it an obligation that the assignor will not engage in operating another mine of the same character in the vicinity.<sup>177</sup>

**47. Abandonment and Surrender.**—As in the case of other leases, the lessee has no right to abandon the demised mine during the continuance of the term for which it was granted, but, the lessor may, under certain circumstances, consider the lessee to have abandoned the mines and to have forfeited his rights under the lease. Provision is sometimes

<sup>176</sup> 157 Pa. 17, 33 (1893).

<sup>177</sup> 66 N. W. Rep. 759 (1896).

made in the lease that, either under certain contingencies, or irrespective of any contingencies, the lessee may abandon or surrender the demised premises. Where the lessee abandons the leased mine, in accordance with the provisions of the lease, he is bound to pay all the rents and royalties that have accrued prior to the abandonment or surrender. It is also sometimes provided that the lessee may, under certain contingencies, surrender the premises, provided all the arrears of rent and all covenants on the part of the lessee have been duly performed. In order to render the surrender of the lease, in such a case, effective, all the covenants must have been performed by the lessee, prior to such alleged surrender of the lease. If the lease of a coal mine enable the lessee, on giving notice, to terminate the lease when all coal should be worked out, the lessee can take the benefit of this provision of the lease and may, when all the coal shall have been exhausted, free himself from all the obligations of the lease by giving the required notice.<sup>178</sup>

Where, under the lease, the lessee has the right to abandon the mine for any reason, as, for instance, because there is no more of the mineral left of such quantity, quality, or condition as could be worked with economy and profit, the lessee is bound by the lease so long as he retains possession of the premises; and the fact that all the minerals of the mine have been mined is no defense to the payment of the rent specified in the lease, if the lessee continue to retain possession of the mine.<sup>179</sup>

If, under the terms of the lease, the lessee have the right to abandon the premises at any time, the fact that he ceased to operate the mine, has removed all the machinery and appurtenances from the leased mine, and has entirely failed to pay the dead rent or royalties provided in the lease, will constitute an abandonment of the lease as against him, and the lessor is no longer bound by the lease, and has the right to have the court declare the lease to be at an end.<sup>180</sup> Independent of any provision of the lease, where the lessee has

<sup>178</sup> 3 Penny. (Pa.) 267 (1882); 4 H. L. Cas. (Eng.) 656 (1854).

<sup>179</sup> 129 Pa. 592, 598 (1889).

<sup>180</sup> 88 Iowa 92 (1891); 83 Va. 577 (1887).

for a long time abandoned the leased mine, the lessor has the right to treat this action as a surrender of the lease on the part of the lessee and can declare the lease at an end.<sup>181</sup>

As against any one else but the lessor, the abandonment by the lessee of the leased mine is not effective until the statutory period of the limitation has elapsed, or until the term under the lease has expired, and the lessee may resume possession, as against third persons, at any time previous to such time. The clause of termination or surrender of the leased estate is for the benefit of the lessor, and no act of the lessee can, as against third persons, produce that result without the concurrence of the lessor.<sup>182</sup> In Pennsylvania, provision is made that where an iron mine has become exhausted, and the one, who by lease or any other conveyance had the right to the mineral on the land, has abandoned the mine for twenty-one years, the owner of the soil is entitled to have the rights of such a person in the mineral estate declared by the courts to be ended.<sup>183</sup>

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### OIL AND GAS LEASES

**48. Property in Oil and Gas.**—Petroleum oil and natural gas are in law regarded as minerals. In the grant of land, whenever a reservation is made of all mines, minerals, and metals in and under land, it includes the oil and gas in or under such land. Oil and gas are substances of a peculiar character, and the law relating to the ordinary cases of mining for coal or other minerals which have a fixed situs, cannot be applied to cases dealing with oil or gas, without some modification.<sup>184</sup> When oil or gas is discovered in any given region, the development of the region becomes immediately necessary. The fugitive character of oil and gas and the fact that a single well may drain a considerable territory and bring to the surface oil that, when in place in the sandrock, was under the lands of adjoining owners, are

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<sup>181</sup> 70 N. W. Rep. 619 (1897).

<sup>182</sup> 165 Pa. 325, 329 (1895); 179 Pa. 175 (1897).

<sup>183</sup> Pa. P. L. 1893, p. 143.

<sup>184</sup> 100 Tenn. 100 (1897).

well-known characteristics of these substances and must be considered in dealing with the law with reference to them.<sup>185</sup> The development of oil or gas often requires a large extent of territory in the control of one person in order to develop the land to the best advantage. These circumstances require some reference to the nature of the title or property in oil or gas, and, also, that there be explained in what respects oil and gas leases are different from leases of mines for the purpose of working minerals having a definite situs.

Being regarded as minerals, oil and gas belong to the owner of the land in or under which they are. When they escape or go into other lands, the title of the former owner is then gone. Oil or gas is not the property of anybody who desires to draw the same. Oil belongs to the owner of the soil on which the well is dug or to him to whom the owner of the soil granted the right to dig the well and to draw it. A stranger may not draw oil from a well sunk by the owner of the soil; if he do, he takes the property of another, and it can be recovered from him, or he can be made to pay for its value.<sup>186</sup> But the ownership of oil or gas by the owner of the soil is not an absolute ownership like the ownership of coal or other mines. The fugitive and wandering existence of these substances within the limits of a particular tract is uncertain and assumes certainty only by actual development founded upon experiment.<sup>187</sup>

**49.** While in the earth, oil is a part of the land, and, should it move from place to place by percolation, or otherwise, it forms a part of that tract of land in which it tarries for the time being, and, if it move to the next adjoining tract, it becomes part and parcel of that tract until it reaches a well and is raised to the surface, and there for the first time it becomes distinct, absolute property—the property of the person into whose well it came. And this is so whether the oil move, percolate, or exist in pools or deposits. In

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<sup>185</sup> 160 Pa. 483, 493 (1894).

<sup>187</sup> 80 Pa. 142, 147 (1875).

<sup>186</sup> 155 U. S. 665 (1875); 119 N. Y. 423 (1890); 15 B. Monr. (Ky.) 479 (1854).



either event, it belongs to the person who reaches it by means of a well.<sup>188</sup> The same thing can, with equal propriety, be said as to the acquisition of title in natural gas. Possession of the land, therefore, is not necessarily possession of the oil or the gas contained therein. If an adjoining or even distant owner drill his own land and tap the gas of another so that it comes into his well and under his control, it is no longer the property of the other, but his.<sup>189</sup> It follows, that the owner of the land has the legal right to sink a well on his land and draw therefrom all the oil or gas that may naturally flow from it, although in so doing he may diminish the supply of an adjoining landowner. Moreover, such an owner will not be restrained by the court from using an explosive in *shooting* his well, so as to increase the natural flow of the gas into his well, provided that such shooting be not accompanied by injury or danger to life or property in the neighborhood.<sup>190</sup> So, the owner of the soil may drill a gas well and for any reason may, in the absence of malice or negligence, allow the gas to escape into the open air.<sup>191</sup> But in Indiana, by statute, it is forbidden all persons operating gas or oil wells to allow natural gas to escape into the open air and be wasted.<sup>192</sup>

According to the most recent authorities there is a difference in the law with reference to ownership of oil and gas. This difference exists because of the essential difference in the nature of the substances. Petroleum oil in the earth is a part of the realty and is owned by the owner of the land in or under which it is situated. Natural gas has been likened to fish in the water and wild game in the forests. They are not the property of any one till they are reduced to possession. It is declared in recent decided cases that natural gas can in no sense be considered as owned by the owner of the soil even while it is in the soil. Where the lessor leases certain lands to his tenant for the purpose only of mining and taking out certain oil at a fixed

<sup>188</sup> 57 Ohio 317, 328 (1897).

<sup>189</sup> 13 Ind. App. 680, 689 (1895); 25 W. N. Cas. (Pa.) 103, 105 (1889).

<sup>190</sup> 131 Ind. 277 (1892).

<sup>191</sup> 157 Pa. 324 (1893).

<sup>192</sup> 150 Ind. 21 (1899).

royalty, and large quantities of hydrocarbon gas issue by its own force from this well, the lessee need not account to the lessor for the gas so appropriated by him or for its value.<sup>193</sup> Gas in the soil is a part of the inheritance. It is only when it escapes out of the possession of the owner, and the one who secures possession of it is not a trespasser, but rightfully on the premises, that he secures the ownership of the gas as against the rights of the owner of the land in which the gas was.<sup>194</sup>

**50. Title of Lessee.**—A lease to carry on the operation of the production of oil or gas is not a grant of property in the oil, but a grant of the possession of the premises for the purpose of searching for and procuring these substances. It gives the lessee an inchoate title to the leased premises until oil or gas be found. If, after a search, no oil or gas be found, the title of the lessee, whatever it is, ends when the unsuccessful search is abandoned. If oil be found, the right to produce becomes a vested right, and the lessee will be protected in exercising it in accordance with the terms and conditions of the lease.<sup>195</sup>

**51. Obligation of Lessee to Develop the Premises.** A different rule of construction obtains as to oil and gas leases from that applied to other mining leases. Owing to the peculiar nature of the minerals and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly in favor of the lessor.<sup>196</sup> Oil is found deposited in a porous sandrock at a distance ranging from five hundred to three thousand feet below the surface. This rock is saturated throughout its extent with oil and where the hard stratum overlying it is pierced by the drill, the oil and gas find vent, and are forced, by the pressure to which they are subject, into and through the well to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in

<sup>193</sup> 150 Ind. 21 (1899).

<sup>194</sup> 28 W. Va. 210 (1886).

<sup>195</sup> 152 Pa. 82 (1893); 99 Fed. Rep. 601 (1900); 90 Fed. Rep. 178 (1898).

<sup>196</sup> 99 Fed. Rep. 606 (1900).

the sandrock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. The difference in the natures of these substances, and the difference in the manner of their production, has resulted in considerable differences in the forms of the oil and gas leases from those of minerals having a fixed situs. Leases of gas or oil territory generally require that operation shall begin within a fixed number of days or months and be prosecuted to a successful end or to abandonment. If the lessee covenant to commence and complete a well within a specified time, it is a condition precedent, on the performance of which depends the validity of the existence of the lease.<sup>197</sup> If the lessee do not attempt to comply with the covenant to drill the test well, the lessor may have the lease declared forfeited and the lessee cannot, after neglecting to comply with this condition of the lease for a long time, claim any further rights under the lease.<sup>198</sup>

**52.** A lease of land for oil purposes imposes an obligation on the lessee that is somewhat different from that of a lease of a mine or quarry. The oil is of such a nature that if not removed through wells upon the surface of the leasehold it may be wholly lost to the owner of the land by reason of operations on lands adjoining. The duty to develop the land, that is, to test thoroughly the existence of oil in the rocks that should bear it, and, if oil be found, to sink so many wells as may be reasonably necessary in view of surrounding operations to secure so much of the oil underlying the land as may be obtained with profit, grows out of the nature of the oil and the methods by which the oil is reached and brought to the surface. An oil lease must be construed, therefore, with a due regard to the

<sup>197</sup> 160 Pa. 559, 567 (1894).

<sup>198</sup> 99 Fed. Rep. 601-612 (1900); 152 Pa. 82 (1898).

known characteristics of the lease. It follows that there is a duty devolved upon the lessee to drill wells, sufficient in number and in such positions as to secure the greatest advantage in the production of the greatest amount of oil. This he is bound to do in the absence of any covenant in the lease imposing that duty upon him.<sup>199</sup>

The performance of the covenant on the part of the lessee to drill a test well within a given time will not relieve him from his implied covenant to drill such additional wells as are necessary to fully develop the oil in the land. Especially is this the case where the sole consideration of the lease is that the lessee shall pay a royalty to the lessor on the oil produced. If the lessee in such a lease construct a test well but do nothing else toward the development of the leased premises, he will be held to have abandoned the same. He will not be allowed to hold the land, without producing the mineral, for speculative purposes, to the great danger of the loss of the whole oil on the part of the lessor, by drainage from neighboring lands.<sup>200</sup>

**53. Distinction Between Oil and Gas Leases.**—Oil and gas leases are ordinarily combined in the same instrument, and are classed together. For many purposes, such classification is natural and appropriate; but when the important difference between oil and gas is taken into consideration, it becomes necessary to distinguish for some purposes between oil and gas leases.<sup>201</sup>

Oil, when brought to the surface, is gathered into receiving tanks at or near the well. When necessary or desirable, it is removed by gravity, or by pumping into the pipe lines that serve the district in which the well is located, and conveyed to storage tanks, where it remains until delivered to a purchaser. It is a matter of no consequence what the pressure may be at the well, for there can be none in the tanks except that of gravity. The well that throws off violently its five thousand barrels per day, and that which

<sup>199</sup> 146 Pa. 185, 200 (1892).

<sup>200</sup> 99 Fed. Rep. 613 (1900).

<sup>201</sup> 146 Pa. 200 (1892).

reluctantly gives up four or five barrels under the persuasive power of the pump, will have their product gathered into the same lines of transportation, or resting in the same storage tanks. Gas cannot be gathered, stored, or transported in this manner. If found in sufficient quantity, it is turned from the well into the line, and the pressure at the mouth of the well is the motive power by which it is driven through the line to the consumer miles away. If the pressure at a given well be much below that in the line, the gas from the well cannot enter the line, but will be driven back by the superior force it encounters at the point of contact. For this reason, a well producing gas in sufficient quantity to be profitably utilized, if there be a market for it near at hand, may be entirely valueless if its product must find a market at a distance too great to justify its transportation by a line of its own. In an oil district, each well, no matter how large or how small its products may be, is separately operated, and a well may be profitably operated so long as its yield pays more than the cost of producing the oil. In a gas district this is impracticable. The product of many wells is gathered into one line, so long as the pressure is sufficient. When the pressure in any one falls below the standard necessary for purposes of transportation, that well must be turned off. Its product cannot be transported separately, and, unless it can be used near by, it is valueless.<sup>202</sup>

It may be readily understood from this statement of facts, that, while in the case of an oil-producing tract of land it may be necessary to drill several wells in order to fully develop the oil in the land, such a duty is not incumbent upon the lessee in the case of a gas lease. In such a case, after the lessee has drilled one well on the leased land and found gas there of sufficient pressure to utilize the gas, he is not bound to drill another well. There may be one good well, from which the lessee can utilize the gas with profit. He may put down another on the same farm, and thereby so reduce the pressure in the first as to wholly destroy its

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<sup>202</sup> 146 Pa. 201 (1892).



value, without getting a sufficient pressure at the second to enable him to utilize that. The gas, if coming from one well, would be of great value. Divided in such manner that the volume and pressure of each is below the necessary standard, the whole is lost.<sup>203</sup>

**54. Abandonment.**—As has been seen, a failure on the part of the lessee either to construct a test well on the demised premises, or to conduct the operation of producing oil after the test well has been drilled and the oil discovered, will work a forfeiture of the lease. But this is only at the election of the lessor. If, therefore, the lessee fail in the covenant to work diligently in constructing wells for oil or gas operations, and the lessor choose not to have the lease declared forfeited, but enforces the payment of the rental provided for in the lease, the lessee cannot refuse the payment of the rent on the ground that the lease is at an end, unless he have formally surrendered the lease to the lessor.<sup>204</sup> Moreover, as against any one but the lessor, or one succeeding to his rights, an abandonment is not complete until the statutory period of limitations or the end of the term granted in the lease.<sup>205</sup>

**55. Rights and Duties of Lessees.**—Where a lease is given for oil or gas mining purposes on certain land, but restricts the lessee's rights to operate to a certain part of the land, the rights of the lessee to drill wells are plainly restricted to these sites. Thus, a grant in a lease of forty acres of land for the sole purpose of mining for oil and gas, excepting and reserving ten acres of the lot upon which no well is to be dug without the consent of the lessor, limits the right of the lessee to operate on the thirty acres. Such a restriction of the rights of the lessee does not in any way diminish his right to all the oil and gas that are in the whole tract. He has a right under his lease to appropriate all the oil or the gas of the whole tract. He has the protection of the entire leasehold and the lessor or any one claiming under

<sup>203</sup> 146 Pa. 203 (1892).

<sup>204</sup> 152 Pa. 53 (1892).

<sup>205</sup> 165 Pa. 325 (1895).

him may not drill wells outside of the designated territory, and thereby lessen the production of the lessee's wells.<sup>206</sup>

Where the lessee has granted to him, according to the terms of the lease, a whole tract of land for the purpose of operating for oil and gas, with the right to operate on one acre of the land for the construction of a test well, with the provision that he must construct the test well within thirty days, and that if he fail to complete the well, he shall pay annually to the lessor a specified price per acre until the well is completed, he is bound to pay the rental, in case of failure to make the test, for the whole tract of the land, not only for the acre to which he is limited to operate.<sup>207</sup>

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<sup>206</sup> 155 U. S. 665 (1894); 144 Pa. 520 (1891).

<sup>207</sup> 13 Ind. App. 600 (1895).



# THE LAW OF MINES AND MINING

(PART 2)

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## RIGHTS AND LIABILITIES OF MINE OWNERS

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### SURFACE RIGHTS

1. The term **mine owner** is particularly applicable to the owner of the mineral estate—not to the owner of the soil. Ordinarily, the question of the rights and the liabilities of mine owners can only arise when the owner of the mine is not the owner as well of the soil in or under which the mine is situated. When a person is given the right to a mineral estate, by purchase, lease, or otherwise, such estate thereby constituting a distinct possession from that of the soil, the right to use the surface in a certain specified manner is also given to such person; yet, often such right is not expressed in the grant of the mine. It is evident, however, the mine owner must have some rights in the surface, or he could not enjoy the rights of his mine. The general rule of law is that a grant of minerals, or a grant of a mine, carries with it the right to dig the mine and remove the mineral. It follows that the owner of the mine is entitled to such surface rights as are reasonably necessary for working and getting the mineral from the mine. These include the right to penetrate through the soil by pits or shafts, or by wells, in order to reach the mineral; also, the right to affix on the soil such machinery as is necessary

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to work the mine and such structures as are needed for that purpose, the right to erect hoisting machinery at a convenient place and air-shafts for the ventilation of his mine, and the right to the surface for the purpose of drainage. He may keep pace with the progress of invention and ingenuity, so far as is necessary for a profitable working of his mine in competition with rivals. Hence, he may adopt new and improved methods that are usually employed in the same business when the use of them is necessary to him. In other words, he may have only what is necessary for the operation of his mines, but he may have it in a convenient way.<sup>1</sup>

Rights to use the surface being confined to the working of the mine and the removal of the mineral, in no case has the mine owner the right to use it for any other purpose. Thus, he cannot use the surface to manufacture the mineral produced from the mine; he cannot smelt the ore he has gotten from the mine or construct coke ovens for converting the coal of the mine into coke. The owner of a lead mine cannot use the surface of the soil to prepare the ore into lead. If this were allowed, the land of the lessor or grantor might with equal propriety be entirely taken up for manufacturing articles from the product of the mine on the premises. But it seems that the right to quarry stone carries with it, as a necessary incident, the right of hewing the stone and preparing it for use.<sup>2</sup>

2. The lessee or owner of the mine cannot use the surface to develop the minerals of an adjoining tract.<sup>3</sup> Where, however, the contract provides that the lessee of a coal mine may use the surface for the mining of the coal from the adjoining land, the lessee has the absolute right to do so provided he fulfils the covenants of his lease. The law gives this right to the surface of the soil to the owner of the mine where nothing to the contrary appears either in the grant or the reservation of any other instrument by which the right to

<sup>1</sup> 84 Ala. 228 (1887); (1895) 1 Q. B. (Eng.)  
459, 466; 93 Mo. 107 (1887); 55 N. Y.  
538 (1874).

<sup>2</sup> 8 Cush. (Mass.) 21 (1851).

<sup>3</sup> 97 Cal. 97 (1892).



mine is given to such owner.<sup>4</sup> But, where it is expressly provided in the instrument of grant that the owner of the mine shall not exercise any or all of these surface rights, he is, of course, bound by such provision. Thus, where the grantor of land reserved for himself the mining rights, and expressly provided in that grant that he would not intentionally open any mine from the surface, or dig any air-shaft, or establish any mining fixtures on the surface of the land, he is bound by the provisions, and neither he nor his successors in title can erect such mining fixtures on the land.<sup>5</sup>

The right to the surface is often expressly granted to the grantee of the mining estate. Where this is the case, the owner of the mine need not exercise it if he do not desire to do so. He can work the mine by instroke or from an adjoining mine, although he has the express right under the grant of the mine to sink shafts and to use the surface for working his mine; and, where the lessee has the privilege to deposit the refuse from the leased mine upon the surface of the leased land, he is not obliged to do so, but can deposit it on the adjoining land.<sup>6</sup> Where a lease to work coal grants to the lessee the liberty of erecting such buildings as are necessary and proper for the purpose of working the coal, the extent of the right is that which is usual among mine workers. Whatever cannot be dispensed with, if the mine is to be worked with reasonable efficiency and success, is included under the terms necessary and proper. It does not mean that which is absolutely necessary and without which the work of the mine could not be carried on, but that which, according to the usage of miners working with ordinary skill, is necessary for carrying on the work. For instance, the construction of cottages for the workmen is often necessary for carrying on the work. If the mines be far removed from any habitable dwellings, it would be impossible for the miners to walk a distance in the evening, exhausted from their day's labor, and, therefore, it would be necessary to provide nearer habitation for them.<sup>7</sup>

<sup>4</sup> 122 N. Y. 509 (1890).

<sup>5</sup> 187 Pa. 500 (1898).

<sup>6</sup> 163 Pa. 84 (1894).

<sup>7</sup> 3 H. & N. (Eng.) 437 (1858).

## RIGHTS OF WAY

3. What we have said as to surface rights is equally applicable to **rights of way**. Where the mining rights are granted or reserved and no provision is made as to the right of way to convey the minerals gotten from the mine, the law will imply that the grantee of the mining rights has the right of way to get to the mine and to haul the minerals to the market or elsewhere for the purpose of disposing of them. The right of way of the mine owner, under these circumstances, is called *a way of necessity*. It will be limited strictly to that which is necessary for him to exercise his rights in the mineral estate. Therefore, the question is not what is most profitable or convenient, but what is necessary. It may happen that the minerals can be more conveniently or profitably removed and put upon the market by an underground, rather than an overland, way; yet, that fact does not determine that the grantee of the mines is to have an underground way. The necessity, if it exist, is of an overland road, and to that alone the grantee is entitled. This doctrine of the right of way by necessity has no application to the case of a grant of mineral rights by the state on unsettled land.<sup>8</sup>

Usually there is granted in express terms a right of way together with the grant of the mineral rights. The right of way in such a case is more extended than the right of way of necessity. The true question in such a case is not whether the road have been made in the manner and in the direction which rigid necessity would point out, but whether it be one of convenience.<sup>9</sup> Thus, where there is a right of way granted to construct a road to convey the products of the mine, the owner is not bound to choose the shortest possible course, if in the exercise of his judgment he, in good faith, find it expedient to adopt a more circuitous road.<sup>10</sup> For the purpose of getting the coal, the owner is not confined to the manner of conveyance used at the time the grant was made;

<sup>8</sup> 90 Tenn. 619, 627, 629 (1891).

<sup>10</sup> 1 John. (Eng.) 255 (1859).

<sup>9</sup> 1 B. & C. (Eng.) 196, 203 (1823).

he can use any other convenient method. He can construct a railroad or build a framed wagonway, as both are generally used in the conveyance of minerals from the mine.<sup>11</sup> But the road cannot be used for the purposes foreign to the grant. Thus, where the owner of the mineral was granted the right to construct a railroad for mining purposes, a branch road cannot be constructed on the land, after the mine has become exhausted, to serve for general railroad purposes. Such a use of the road is evidently foreign to the purpose of the grant. The laws with reference to the rights of way apply as well to subterranean ways as to those upon the surface.<sup>12</sup>

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#### TIMBER RIGHTS

4. In a lease of mines, at common law, the lessee has no rights to the timber growing on the land for the purpose of working his mine, but he has the right to remove as much of the timber as is necessary to get to the mine; he cannot cut it for the purpose of working his mine. However, it is held that a lease of a lead mine, together with the right to smelt the ore on the leased premises, includes the use of so much of the timber as is necessary for fuel for the smelting of the ore.<sup>13</sup> Where a life estate is granted, together with the mining rights, the tenant has a right to use so much of the timber as is necessary to work the mine.<sup>14</sup> A devise for life of the land containing salt wells includes the use of the woodland for fuel used in connection with the works of the salt wells.<sup>15</sup>

Under congressional legislation, the right to use the timber on public land is given to those citizens of the United States who have located mining claims on mineral lands, in certain states and territories.<sup>16</sup> Such timber right must, however, be exercised as incidental to and in aid of the right to mine

<sup>11</sup> 6 M. & W. (Eng.) 174, 178 (1840); 1 T. R. (Eng.) 500, 509 (1787).

<sup>12</sup> 136 Pa. 439 (1891); 6 M. & W. (Eng.) 174 (1840); 37 Ohio 570 (1882).

<sup>13</sup> 5 Yerg. (Tenn.) 378 (1825).

<sup>14</sup> 19 Pa. 323 (1852).

<sup>15</sup> 6 Munf. (Va.) 134 (1818).

<sup>16</sup> 19 & 20 Stat. L. 88, 89 (Acts June 3, 1878,) cc. 150, 151.

on the land, and is consequently limited to the use of such timber as is necessary to the actual working of the mining claims. Where the owner of a claim cut timber from four acres in advance of his mining operations and disposed of the same for his own benefit, it was held that he did not thus exercise the rights given him under the act of congress, and that his cutting of so much timber was not necessary to the operation of mining." There are two acts of congress relating to cutting timber on the public domain for mining purposes, both of which were passed on the same day. They are designated as chapters 150 and 151, respectively, but it does not appear which was first passed. The one designated as chapter 150 provides that "all citizens of the United States, and other persons, *bona-fide* residents of the states of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, or Montana, and all other mineral districts of the United States, shall be and are hereby authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber, or other trees growing or being on the public lands, said lands being mineral and not subject to entry under existing laws of the United States, except for mineral entry in either of said states, territories, or districts of which such citizens or persons may be at the time *bona-fide* residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber, and of the undergrowth growing upon such lands, and for other purposes."

The act designated as chapter 151 is entitled "an act for the sale of timber lands in the states of California, Oregon, Nevada, and Washington Territory." It contains six sections applicable to timber lands in the states and territory named in the act, but its provisions are wholly inconsistent with the provisions of the other act, and so they have been construed by the courts, which have held that the clause *mineral districts of the United States*, in the act known as

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175 Sawy. (U. S.) 68 (1878).

chapter 150, has no application to Oregon, California, or any other state or territory mentioned in chapter 151. The most that can be said of the clause is that it can only refer to "all other mineral districts of the United States" not otherwise specifically pointed out by other provisions, the two acts (chapters 150 and 151) being regarded as one.<sup>18</sup>

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### REFUSE OF MINERALS

**5. Right to Deposit.**—In the anthracite coal mining regions, coal refuse is commonly designated **culm** or **coal dust**. It is the refuse of coal described as a soft or slaty and inferior kind of anthracite coal.<sup>19</sup> In metal mining, the term **tailings** is applied to refuse or inferior portions of washed ore that are regarded as too poor to be treated further, as distinguished from material that is to be smelted. Generally, in the absence of agreement to the contrary, culm is the property of the mine owner, whether he be such by purchase or lease. However, a lease may provide that the lessor shall be entitled to the refuse.<sup>20</sup> So, too, as to other refuse. Tailings of a mine, the products of the miner's labor, are his property. He may, however, abandon this property by casting it away or by suffering it to go where it will be unobstructed. If a miner allow his tailings to mingle with those of other miners, this does not give a stranger a right to the mixed mass, but, where tailings are allowed to flow upon the claim of another, the latter is entitled to them.<sup>21</sup> When once abandoned, such refuse may be appropriated by another, provided it be not reclaimed before the appropriation.

The rule at common law is that a miner is bound to dispose of his refuse so as not to injure others. He must deposit it on his own lands—not on the lands of others. Where the minerals are owned by one person and the soil by another, the former has a right to deposit his refuse upon

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<sup>18</sup> 11 Fed. Rep. 487 (1882); 21 Fed. Rep. 285 (1884).

<sup>20</sup> 163 Pa. 84 (1894).

<sup>21</sup> 9 Cal. 237 (1858).

<sup>19</sup> Cent. Dict., Stand. Dict.



the surface; but this right is limited to the refuse of the mines beneath the particular surface estate, though it may by the terms of the conveyance or contract be enlarged to include that from adjoining mines. The deposit must be made in such a manner that the refuse will not, by the ordinary action of nature, be carried upon the land of others."<sup>22</sup> In some jurisdictions, the common-law rule does not obtain. In Colorado, the deposit of tailings is regulated by statute, by which a miner is required to take care of his own tailings on his own property, or become responsible for all damages that may arise therefrom."<sup>23</sup> In California, a miner may appropriate such ground as may be necessary to the proper working of his mine; as, where the deposit is of such a character that the first washings extract only a portion of the metal."<sup>24</sup>

**6. Pollution of Streams.**—The rights and liabilities of mine owners where streams are polluted by refuse that is washed into them are determined by the principles of law which apply to riparian owners or proprietors. As explained in a preceding section, "Every riparian proprietor, through whose land a watercourse flows, has a right to the reasonable use of the water. This right is not an absolute right of property, but is qualified by the equal right of other riparian owners. . . . They have no right to the water itself, but a simple usufruct—the right to enjoy it. This right extends to the water in its natural state, without material diminution in quantity, or alteration in quality." Accordingly, while each riparian proprietor is entitled to the reasonable use of the water on his property, "he has no right to pollute the quality of the water by unwholesome or discoloring impurities."<sup>25</sup>

The subject of pollution of streams in the pursuit of mining operations is one over which there has been much litigation, and the cases have presented to the courts for their consideration many intricate problems, which have

<sup>22</sup> Barr. & Ad. M. & M., p. 607.

<sup>23</sup> 12 Colo. 12 (1888).

<sup>24</sup> 9 Cal. 237 (1858).

<sup>25</sup> See *The Law of Property: Water Rights, Watercourses*.

been variously determined according to the circumstances surrounding each particular case. Judicial intelligence and acumen have vied to apply the well-grounded general principles of law pertaining to the rights of persons to the cases that have been called for adjudication, according to justice and equity, so that great diversity of opinion exists as to what extent private and personal interests must yield to the convenience of the mining industry and the necessities of great communities. The opinions of able judges who have wrestled with the intricate questions involved in the contests concerning the pollution of streams contain much that tends to qualify the general rules applicable in such cases, but there is no wide departure from the time-honored and universal doctrines that early in the history of jurisprudence were accepted as the correct ones.

In Pennsylvania, it is held that damages resulting to another from the natural or lawful use of land by the owner are, in the absence of malice or negligence, *damnum absque injuria*—an injury without wrong, or, according to Broom's Maxims, a wrong done to a man for which the law provides no remedy. One may, therefore, operate a mine on his own lands in the ordinary and usual manner, and drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners. The use by the latter of the stream must from necessity give way to the interests of the community, in order to permit the development of the material resources of the country and to make possible the prosecution of the lawful business of mining coal.<sup>26</sup>

7. This doctrine was enunciated in a case where, by mining operations, a stream of pure water used for domestic purposes by another was polluted by mine water so as to be unfit for such purposes, and it was sought to recover

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<sup>26</sup> 113 Pa. 126 (1886).

damages for such pollution. The court said, substantially, that mining in the ordinary and usual form is the natural use of coal lands; they are, for the most part, unfit for any other use. It is established that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful and proper mining operations. In having the natural use of his own land, and by not going beyond what is necessary for such use, if damage result to another, the latter must show that the owner of the land exceeded the bounds of natural use. The right to mine coal is not a nuisance in itself; it is a right incident to the ownership of coal property, and, when exercised in the ordinary manner and with due care, the owner cannot be held for permitting the natural flow of mine water over his land into the watercourse, by means of which the natural drainage of the country is effected. There are percolations of mine water into all mines, the discharge of which is practically a condition upon which the ordinary use and enjoyment of coal lands depends; this discharge is part of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce serious results to a leading industrial interest. It is declared, both in England and the United States, that in the lawful use of his own land, a person may cause to flow over the land of another a greater quantity of water than it is naturally subjected to. It is a most important principle, both to agricultural and mining operations, that the superior owner may improve his lands by throwing increased waters upon his inferior through the natural and customary channels.<sup>27</sup> However, in a recent case in England, it is held that a riparian owner cannot lawfully pour into the stream a large body of water pumped from his mine, which so changes the quantity and character of the water as to injure a lower riparian owner in the use he has made of the stream in manufacturing.<sup>28</sup>

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<sup>27</sup> 113 Pa. 146-151 (1886), citing L. R. 6 Ch. Div. (Eng.) 773 (1877); L. R. 11 Ch. Div. (Eng.) 782 (1879); 3 H. & J. (Md.) 231 (1811); L. R. 3 H. L. C. (Eng.) 330 (1868).

<sup>28</sup> (1893) App. Cas. (Eng.) 691.

Where a mine owner takes care of his refuse on his own land, as he is bound to do, and does it so negligently that every ordinary flood carries it into the natural stream for drainage, he will be liable in damages, if injury to another occur; but, if he guard against floods by placing the mine refuse where it cannot be carried off by them, an extraordinary flood will be treated as an inevitable accident, and, if injury be caused to others, he will not be liable.<sup>29</sup> Cases may arise where streams from pollution may become nuisances which will be abated because the public interests, as involved in the general health and well-being of the community, require them to be abated. Public nuisances may be created by dumping large quantities of mine débris on the banks of navigable streams, thus affecting the rights of an entire community by impairing navigation. Persons committing such nuisance will be enjoined by equity proceedings.<sup>30</sup>

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### SURFACE AND LATERAL SUPPORT

8. The general rule of law that a person may use his property as he sees fit is modified or controlled by the equitable principle that one must use his property so as not to injure the property of another. In the natural state of land, one part of it receives support from another, upper from lower strata, and soil from adjacent soil. This natural law is recognized in our civil law; hence arises the rule of law that of common right the owner of the surface is entitled to the support of the surface from the subjacent strata and the owner of a piece of land to the lateral support of his soil from adjacent soil.

Both surface support and lateral support are governed by the same rules of law. The right of support is not an easement, held by a distinct title, but it is an incident of the land itself. It exists generally without reference to the nature of the strata, or the difficulty of propping the surface, or the comparative value of the surface and the minerals

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<sup>29</sup> Barr. & Ad. M. & M., p. 614.

<sup>30</sup> 66 Cal. 138 (1834).

It is an absolute right of property.<sup>31</sup> Infringement of this right consists in causing injury to the surface, as by subsidence thereof, or the falling away of lateral soil. This is independent of any question of negligence in mining beneath the surface or excavating near the boundary line of the land in question. One who so mines, or so causes excavation to be made, is bound to see that sufficient soil is left to support the surface or to prevent the adjacent land from falling in.<sup>32</sup> The wrong consists, not in making the excavation, but in the act of allowing the other's land to be injured thereby. The owner of the mine has a right to excavate his land or to dig his mine, provided he leave adequate support, surface or lateral, as the case may be. Hence, it follows, that in digging his mine he may remove all the natural support, right up to the adjoining land, if he leave in its place an artificial support sufficient for the purpose. If he build an artificial wall sufficient for the purpose of giving lateral support to the adjoining land, he complies with his duty, even if he excavate all the land up to the adjoining land. So, also, he may remove all minerals from beneath the surface, provided he leave pillars or posts sufficient in strength and in number to secure the safety of the surface.

9. A landowner is entitled to the support of his neighbor's land. One's neighbor, for this purpose, is the owner of that portion of the land, whether a wider or narrower strip, the existence of which in its natural state is necessary for the support of the former's land. So long as that land remains in its natural state and it supports the former's land, he has no rights beyond it. There might be land of so solid a character, consisting of solid stone, that a foot of it may be enough to support the adjoining land. There might, on the other hand, be land so friable and of such an unsolid character that a quarter of a mile of it would be necessary for that purpose.<sup>33</sup> The land which is entitled to support,

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<sup>31</sup> L. R. 19 Eq. (Eng.) 115, 126 (1874); 6 A. C. (Eng.) 740, 791 (1881); 12 Q. B. (Eng.) 738, 745 (1850).

<sup>32</sup> 57 Minn. 493 (1894).

<sup>33</sup> 6 Ch. Div. (Eng.) 284, 289 (1877).



whether surface or lateral, must be land in its natural state; that is, the land itself is entitled to support, but this right does not include buildings or structures on the land. In order to be entitled to support of this additional weight on the land, the owner of the soil must claim it as an easement. It must be either a right founded on grant or having its origin by prescription, by use for the proper length of time. Once this right to the support of the additional structures on the land is acquired, it is essentially like the right of the support of the land in its natural state. It will be seen, however, that the manner of acquiring these two rights is very different. Support of the buildings on the land must be claimed by a distinct title, the derivation of which must be shown either by grant or by prescription. The right to the support of the land in its natural state is an incident of the land itself; it is a right existing because of the ownership of the land, without which right the enjoyment of the very ownership of the land itself can be defeated.<sup>34</sup>

10. Aside from the right of an easement or grant, a man cannot claim surface or lateral support of any additional buildings, structures, or machinery that are on his lands. Moreover, when a person has excavated his own land and removed the minerals thereunder, or has undermined and removed the natural support of his land near an adjacent tract of land, he cannot prevent the owner of the adjacent land from carrying on his mining operations, on the ground that thereby the surface of his land is endangered. If he have not excavated his own lands, the mining carried on by the adjoining landowner will in no way injure the surface of his land. To illustrate: If a perpendicular wall built by an adjoining landowner would have given sufficient lateral support to the soil in its natural state of the one the lateral support of whose land is in question, he is entitled only to have such wall properly built and maintained. If the owner of such land have previously dug out the mines

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<sup>34</sup> 12 Q. B. (Eng.) 738 (1850); 6 A. C. (Eng.) 740 (1881); see *The Law of Property: Easements and Servitudes*.

from under it and have heavy machinery operating on its surface, he cannot compel the adjoining landowner to leave additional support for his land on the ground that the land by reason of these facts needs a greater lateral support than if it were in its natural state.<sup>35</sup> Where between land of the owner of the soil and that of the owner of the colliery there is an intermediate piece of land, the coal of which had been worked out by a third person, and, in consequence of the present working of the colliery, subsidence is caused in the surface of the land, which would not have happened had the intermediate land not been mined, the owner of the land is not entitled to have work in the colliery stopped on the ground that it takes away his lateral support. The support to which the landowner is entitled is to such a strip of adjacent land as in its natural undisturbed state is sufficient to afford the requisite support.<sup>36</sup>

It seems that the doctrine of support, surface or lateral, has no application to the case where the land is of no value as land, but is valuable principally from the use that can be made from the soil. Thus, where the land is used solely for the purpose of locating mining claims, and the sole use that can be given to the land is to wash it away for the purpose of extracting gold therefrom, the doctrine of lateral support does not apply.<sup>37</sup>

#### SURFACE AND SUBTERRANEAN STREAMS

11. There is need of further explanation of the rights of riparian owners as to surface streams, navigable and non-navigable, in addition to what has already been said about their rights in cases where streams are polluted by mining operations. Riparian owners are without rights in navigable streams below low-water mark; the streams as well as the soil thereunder are the property of the state. It follows that a riparian owner can have no greater interest in such a stream than any other private individual; he can exercise no rights of ownership as against the public. As to non-navigable

<sup>35</sup> 50 Mo. App. 525 (1892).

<sup>36</sup> 6 Ch. Div. (Eng.) 284 (1877).

<sup>37</sup> 35 Cal. 534 (1868); 59 Cal. 190 (1881).

streams, the common-law rule is that each riparian owner takes the land to the center of the stream and has the right to the use of the water flowing over the land as an incident of his ownership thereof. All such owners on the same stream have an equality of right to the use of that water as it naturally flows without diminution in quantity, except so far as that diminution may be created by a reasonable use of the water for certain domestic, agricultural, or manufacturing purposes. It follows that there cannot be any such diversion or use of the water by one owner as would work material detriment to any other owner below him. Nor can the water be so retarded by one owner in its flow as to be thrown back to the injury of another owner above him. Though the riparian owner may use the water while it runs over his land as an incident of ownership of the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary natural channel when it leaves his estate. In other words, any proprietor above cannot diminish the quantity, or injure the quality, or change the direction of the water which would naturally descend in its natural channel; nor can any proprietor below throw back the water on the land of the proprietor above him.<sup>38</sup> But a riparian owner may by grant or by prescription acquire the right in such stream, either to increase or diminish its flow or to change the quality of its water. The law with reference to acquiring such a right by prescription is the same as the law with reference to the acquiring of any easement.<sup>39</sup> These principles are stated elsewhere in this and other sections of this Course, but are particularly appropriate here.

**12.** Certain special rules of law are peculiarly applicable to the Pacific states and territories which were once a part of the public domain, notably California. The United States government has, by its silent acquiescence, assented to the general occupation of public lands for mining purposes, and, to encourage their free and unlimited use for such purposes,

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<sup>38</sup> 20 Wall. (U. S.) 507 (1874); 12 M. & W. (Eng.) 324 (1843).

<sup>39</sup> See *The Law of Property: Water Rights, Watercourses, Surface-Water*.

has reserved mineral lands from sale and acquisition of title by settlement. Hence, there has grown up a principle that he who first connects his own labor with property, situated on the public domain and open to general exploration, acquires a better right to its use and enjoyment than others who have not given such labor. This principle was recognized by the miners throughout the Pacific states and territories, and at an early period the principle itself was recognized by legislation and enforced by the courts. In 1866, congress passed a law, and subsequently other acts were passed, which provide that all valuable mineral deposits in lands belonging to the United States are declared to be free and open to exploration and purchase. There is provided a system, according to which title to mining claims may be acquired, the system itself being founded upon the principle of prior exploration, discovery, and appropriation.<sup>40</sup>

In consequence of the principle which had thus arisen among the miners, founded upon the right of prior appropriation, there grew up simultaneously a system of rules with respect to mining on public lands by the voluntary action and assent of the population whose free and unrestrained occupation of the mineral region had been tacitly assented to by the federal government and heartily encouraged by the expressed legislative policy of the states and territories. Among these, the most important are the rights of the miners to be protected in their selected localities and the rights of those who by prior appropriation have taken the waters from their natural beds and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold digging, and without which the most important interest of the mineral region would remain without development. This water right of the miner, originating as it did by custom, was also recognized by the legislatures and courts of those states and gave a good title to use the waters as appropriated, as against any person subsequently appropriating the same.

<sup>40</sup> 20 Wall. (U. S.) 507, 670 (1874); U. S. R. S., Secs. 2,318, 2,342.

But no title to such water right could thereby be acquired as against the United States or its grantee. Subsequently, as in the case of mining claims, so in the case of water rights by appropriation, this principle was recognized in legislation by congress, which provides that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, and other purposes, have been vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same. The right of way for the construction of ditches and canals for the purposes specified is acknowledged and confirmed. All patents or homesteads granted or allowed by the United States shall be subject to any vested and accrued water rights as above described. The right to water by prior appropriation, thus established by law, is limited in every case in quantity and quality by the use for which the appropriation was made. The first appropriator has only the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of his appropriation.<sup>41</sup>

**13.** The law governing subterranean streams differs somewhat from that relating to surface streams. What has been said with reference to acquiring possession and ownership of natural oil and gas applies equally well with reference to subterranean streams and wells supplied by underground springs or percolations. The owner of the land may dig a well in his land and draw into his well the water from neighboring lands by percolation, and by so doing he will be likely to disturb the subterranean streams or percolations of water which supply such a well. In the absence of negligence or malice, such an owner will not be liable for the loss of such a stream or the drying up of such a well. With special regard to the question of

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<sup>41</sup> 20 Wall. (U. S.) 507 (1874); U. S. R. S., Secs. 2,339, 2,340.



mining, the rule is that where one carries on mining operations in his own land in the usual manner and thereby drains away the water which flows in a subterranean course and supplies a spring or well of an adjoining landowner, he is not liable to answer for the loss. Mining operations must interfere to a greater or less extent with those subterranean streams and percolations of water which appear upon the surface as springs. To say that the owner of the substrata shall be accountable in damage for their disturbance, is to say that he shall have no use whatever of his minerals; for, without interfering to some extent with such waters, mining is impossible.<sup>42</sup>

The distinction between the rights in surface and in subterranean water is not founded on the fact of their location above or below ground, but on the fact of knowledge, actually or reasonably acquired of their existence, location, and course. A surface stream flowing in a clearly defined channel cannot be diverted without the knowledge that the diversion will affect a lower riparian owner. It is, moreover, possible to see such a stream and to avoid diverting it without serious detriment to the owner of the land through which it flows. Not so with an unknown subterranean stream. The percolations spread in every direction. The water therein does not flow openly, but through the hidden veins of the earth beneath the surface. It is, therefore, often impossible to foresee the effect upon such a well or stream in the land of one's neighbor by a person mining or excavating his own land, and it is often impossible for him to avoid disturbing such stream without relinquishing his right to dig therein for mineral deposits therein contained. Where, however, the subterranean stream is not so hidden, but has a defined flow which is known or ascertainable, rights in it will be treated on the same basis as in a surface stream. Thus, where the owner of the soil in digging for oil or gas has knowledge that neighboring water wells are supplied from a stratum of clear water underlying

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<sup>42</sup> 12 M. & W. (Eng.) 324 (1843); 80 Pa. 81 (1875).

his land, and that there is a deeper stratum of salt water likely to arise and to mingle with the fresh water when the boring of the well penetrates both strata, he is bound to prevent such mingling of the water if he can do so by a reasonable outlay of expenditures.<sup>43</sup>

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### DRAINAGE OF MINES

14. A source of much contention in mining operations has been the drainage of mines. To define the rights of adjoining owners of mining properties in this respect, the legislatures of some of the United States have enacted laws to govern the manner in which the drainage of mines shall be conducted. In some of the western states, the legislatures have provided elaborate systems of joint drainage by adjoining owners. Iowa has prescribed a royalty to be paid to those who rid a mine of water. In Missouri, the owner of mines is compelled to drain for the benefit of his licensees, or be deprived of a remedy for the collection of his rent. In the public land states, the regulation of drainage has been left by congress to the local legislatures.<sup>44</sup>

The rights of mine owners with respect to drainage are the same as the rights of surface drainage at the civil law. The rule of the civil law seems to be in force in Pennsylvania, Iowa, Illinois, California, and Louisiana, and is referred to with approval in Ohio. In England, and in Connecticut, Indiana, Massachusetts, Missouri, New Jersey, New Hampshire, New York, Vermont, and Wisconsin, the doctrine of the common law obtains. The difference between the civil and common law in this regard is that by the civil law the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon, or over the land of the servient owner, as in a state of nature; such natural flow cannot be interrupted or

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<sup>43</sup> 131 Pa. 143, 159 (1889); 13 M. & W. (Eng.) 324, 348 (1843); 29 Pa. 59 (1857).

<sup>44</sup> Barr. & Ad. M. & M., p. 632, citing Stats. of Colo., Idaho, Ill., Iowa, Mont., Nev., Pa., Wis.

prevented by the servient owner to the detriment or injury of the estate of the dominant or any other proprietor. The doctrine of the common law is that there exists no such natural easement or servitude in favor of the owner of the superior or higher ground or fields as to mere surface-water, or such as falls or accumulates by rain or the melting of snow, and that the proprietor of the inferior or lower estate may, if he choose, lawfully obstruct or hinder the natural flow of such water thereon, and, in so doing, may turn the same back upon or off, on to, or over the lands of other proprietors without liability for injuries ensuing from such obstruction or diversion.<sup>45</sup>

15. The supreme court of the United States has considered it useless to cite the many authorities from the different states in which on the one side or the other these doctrines of the civil or common law are affirmed. The divergency between the two lines of authorities is marked, springing from the difference in the foundation principle upon which the two doctrines rest, the one affirming the absolute control by the owner of his property, the other affirming a servitude, by reason of location, of the one premises to the other. If a case came to that court from one of the states in which the doctrine of the civil law obtains, it would be the court's duty to follow the decisions of that state, having respect for that which is a matter of local law. In like manner the court will follow the adverse ruling in a case coming from a state in which the common-law rule is recognized.<sup>46</sup> However, with particular regard to mine drainage, some authorities need be mentioned to more clearly define the rights of adjoining mine owners.

In the working of upper and lower levels of the same vein, the maxim of the law that one is to so use his own property as not to injure the property of another, obtains. Where the mines of two adjoining mine owners are on the

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<sup>45</sup> 165 U. S. 604 (1897); see *The Law of Property: Easements and Servitudes, Surface-Water*.

<sup>46</sup> *Ibid.*

same level, as where the same vein of coal is worked by two adjoining owners, neither owner owes any duty of drainage to the other; but where the mines are so situated that one is lower than the other, the lower mine must receive the water in its natural channel from the upper mines. By this is meant that the upper mine owner is not required to control the natural flow of the water from his mine. He can work the whole of his mine in the usual manner for the purpose of getting out his minerals in any part of that mine, and he is not liable for any water that flows by gravitation into an adjoining mine from works so conducted. But he has no right to be the active agent of sending the water into the lower mine. For example, if the occupier of the upper mine in working his mine actually pump the water from a lower seam into the upper seam of his mine so that it flows into the lower mine, he is answerable for the damage thereby incurred upon the lower mine owner.<sup>47</sup> If the owner of the upper mine conduct water into his neighbor's mine which would not otherwise go there, or if he cause the water to gather at different times and in larger quantities than it would gather naturally, he commits a wrong which the law will redress.<sup>48</sup>

**16.** While the mine owner may not be an active agent in bringing water to his neighbor's land, he is under no obligation to keep the water out of his mine, provided he carry on his mining in an ordinary and proper manner, although for his own advantage, he may keep the water from flowing into his mine. If his mine adjoin an abandoned mine which is filling with water, thus threatening to drown out his mine as well as the mine of the owner below him, he may build a dam across his mine to keep the water back. He must build the dam in a proper manner and of sufficient strength. If he have done that, and if subsequently the dam, by reason of the force of the constant accumulation of water, give way and drown out a lower mine, he is not liable. Each owner

<sup>47</sup> 5 Leg. Gaz. (Pa.) 392, 394 (1873); 15 C. B. N. S. (Eng.) 376 (1863).

<sup>48</sup> 42 N. J. Eq. 157 (1886).

of a mine has the right to take out all the minerals within the limits of his own boundaries; that is, each owner may work to the dividing line in every direction, but cannot cross it without becoming a trespasser. While this is so, common prudence and self-interest would say to the owner of the lower mine, when danger from water is apprehended, as is generally the case, that he should not work up to the dividing line between his mine and that of the upper owner, but should leave a wall of the mineral within his own boundaries of sufficient width and strength to protect him from encroachments of the water of the upper mine, which, if unobstructed, would necessarily flow into his mine.<sup>49</sup> In Pennsylvania, provision is made by statute that in working anthracite coal mines the owner of adjoining coal properties shall leave a pillar of coal along the line of adjoining property, of sufficient width, that, taken in connection with the pillar to be left in the adjoining property, shall be a sufficient barrier in case the other mine should be abandoned and allowed to fill with water.<sup>50</sup> In the same state, in the statute relating to bituminous coal mines, it is provided that "no operator shall be permitted to mine coal within fifty feet of any abandoned mine containing a dangerous accumulation of water, until said danger has been removed by driving a passageway so as to tap and drain off the water . . . , provided that the thickness of the barrier pillars shall be greater, and shall be in proportion of one foot of pillar thickness to each one and one-quarter foot of waterhead, if, in the judgment of the engineer of the property and that of the district mine inspector, it is necessary for the safety of the persons working in the mine."<sup>51</sup>

<sup>49</sup> 116 Ill. 543 (1886).

<sup>50</sup> Pa. P. L. 1891, p. 183.

<sup>51</sup> Pa. P. L. 1893, p. 67.



## STATUTORY RIGHTS OF MINERS

**17.** The term **miners**, in its general acceptation, includes all who are employed in the occupation of mining; not those only who actually delve in the ground for the mineral and cut it from the veins or seams. Laborers, who load the cars; engineers and firemen, who manage the machinery that hoists the coal to the surface and keeps the mines free from water; breaker boys, slate pickers—all, in short, who work in and about the mine, come under the general appellation of miners. As a class, miners have been the object of greater legislative concern than any other class whose rights, duties, and obligations are governed by the principles of law applicable to the relation of master and servant. In those countries and states where mining is an important industry, the statute books contain provisions tending to ameliorate the hardships and dangers of this very hazardous occupation, and to regulate the payment of the wages earned in the employment.

**18. Health and Safety Statutes.**—The various legislative enactments in England and in many of the United States, which have for their object the health and safety of those engaged in mining, may conveniently be termed **health and safety statutes**. It is well said, by an authority, that a discussion of the cases arising under these statutes is impossible, because they involve no general principle. They have been held constitutional, and are declared to be an exercise of the police power. As to the propriety and validity of such decisions, there can be no question. In their relation to the law of negligence, these statutes enlarge and define the obligation of the mine owner, and fix absolutely his responsibility for injuries resulting from failure to comply with the law, wherever that failure is the proximate cause of the injury. But the violation of such a statute does not excuse contributory negligence or authorize the

employe to neglect his own safety.<sup>52</sup> In some states, these statutes "require the employment by mine owners of competent superintendents or mine bosses from a class who are licensed by the state. If a mine owner has been reasonably careful in the selection of such officers, he is not liable for their negligence. A statute which attempts to make him so responsible is void."<sup>53</sup> Some of the cases in which the courts have construed the health and safety statutes are instructive, notwithstanding they are concerned solely with the questions of construction and apparently involve no principle that has not been hereinbefore explained. As these cases for the most part show the object and reason for the enactment of the statutes, a brief review is given.

19. Statutes in England and in some of the United States provide for the appointment or election of inspectors of mines, upon whom devolve the duty of having the statutory regulations with reference to the safety of the mines complied with.<sup>54</sup> There is also provision imposing the duty on the mine owners of providing a competent and practical inside overseer, called a mining boss, whose principal duty is to see that the mine is kept properly ventilated. He is selected by the mine owner in obedience to the command of the law, and in the interest and further protection of the miners. It has therefore been properly held, in Pennsylvania and other states, that where a mine owner has exercised reasonable care in the selection of a competent mining boss, he is not responsible for injuries resulting from the negligence of such boss. His coemployes take the risk of his negligence, precisely as in other cases. If he be incompetent or careless, the miners can at once discover it and notify the superintendent, while the mine owner, with every wish to protect the miners, has no such opportunity of information. Mining is always hazardous with the best of appliances and the highest degree of care. The very safety of the miners themselves requires that, in measuring responsibility

<sup>52</sup> Bouv. Law Dict., citing Barr. & Ad. M. & M., pp. 780, 783.

<sup>53</sup> Barr. & Ad. M. & M., p. 786.

<sup>54</sup> 66 Pa. 99 (1870).

for accidents, care should be taken to determine it justly, with due regard to the rights and duties of the parties, employers and employes.<sup>55</sup>

In Colorado, it is held that the primary object of the statute is to secure the health and personal safety of all persons engaged in underground coal mining, and, while it is the duty of the mining boss to see that sufficient timber of suitable lengths and sizes is placed in the working places of the mine, the duty of securely propping the roof of the mine, by actually setting such timbers, devolves on any miner, workman, or other person having control of any working place in the mine, the wilful neglect of such duty being a misdemeanor under the statute. A miner who is injured by reason of such neglect is guilty of contributory negligence.<sup>56</sup> In that state, under statute, the mining boss, in the absence of proof that he had any other authority than that derived from the statute, is held to be a fellow servant of the miners, and the mine owner is not responsible for injuries caused to workmen by his negligence.

**20.** Other provisions of the health and safety statutes have reference to safe machinery and appliances, and for ventilation; also, to sufficient places and means of ingress and egress about mines. In Illinois, where the statute requires "the top of each shaft" to be "securely fenced by vertical or flat gates properly covering and protecting the area of the shaft," a mining company was held responsible for the death of an employe which could have been prevented if the company had complied with the statute.<sup>57</sup> The same statute requires two distinct means of ingress and egress from any mine or shaft in which more than fifteen miners are employed, and gives a right of action for injury to person or property occasioned by any wilful violation of the statute, and a right of action to the widow of any person killed by reason of such wilful violation. Where, during a fire in a mine having no second escapement, a miner fell down a

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<sup>55</sup> 115 Pa. 368 (1886); 77 Ill. 640 (1875).

<sup>57</sup> 68 Ill. 174 (1873).

<sup>56</sup> 20 Col. 320 (1894).

shaft and was killed, the mining company was held liable to the widow, without proof of negligence, and it was declared to be no defense that the miner did not exercise presence of mind, the company having given him reasonable cause for alarm.<sup>58</sup> When recovery is sought on the ground of the mine operator's wilful violation of the statute, neither the injured miner's contributory negligence, nor the fact that the injury occurred through the negligence of a fellow employe, are good defenses.<sup>59</sup>

The rule in Illinois, that contributory negligence of the injured person will not defeat his right of action according to the statute, is not in accord with the rule laid down in other states. Generally, even where such a provision is made in the statute, the rule is that the injured party cannot recover where he himself is guilty of contributory negligence.<sup>60</sup> Mere knowledge on the part of the injured employe that the mine owner failed to comply with the requirements of the act will not defeat his right to recover damages for an injury that was occasioned by such failure. It is not considered in the eye of the law that he is guilty of contributory negligence by continuing in his employment under such circumstances, as he had a right to expect that if the mine owner did not comply with the statute he has taken other measures, equally effective, looking to the safety of the employment.<sup>61</sup>

**21. Wages of Miners.**—Probably there is no subject that arouses more concern in the breast of the average legislator whose constituency is composed wholly or partly of the mining class than that of the wages of those employed in and about mines. In this behalf there have been enacted many statutes, the constitutionality of which has been frequently questioned, resulting in decisions against their constitutionality on the ground that they are class legislation and deprive the miner and mine owner of the right of contracting. Of such is the statute passed in Illinois, in 1891, prescribing that mining and certain other corporations

<sup>58</sup> 84 Ill. 126 (1876).

<sup>59</sup> 52 Ill. App. 69 (1893).

<sup>60</sup> 88 Mo. 71 (1888); 53 Ohio 26 (1895).

<sup>61</sup> 97 Mo. 62 (1888); 53 Mo. 26 (1895).

shall make weekly payments to employes, and the statute enacted in the same year in Pennsylvania, called the semi-monthly pay law.<sup>62</sup>

In the matter of miners' wages, the legislatures in some of the United States have enacted statutes prescribing in what the payment of wages must be made or forbidding the payment of wages in certain obligations, known as store orders. In certain states, having such statutes, the courts have declared them to be unconstitutional on grounds similar to those before mentioned with regard to the time of payment of wages. Thus, in Illinois, a statute entitled "An act to provide for the payment of wages in lawful money and to prohibit the truck system, and to prevent deductions from wages except for lawful money actually advanced," was declared unconstitutional. The statute was regarded as an attempt to prohibit persons engaged in mining and manufacturing from keeping a truck store, or being interested in or controlling a store for the furnishing of supplies, tools, clothing, provisions, or groceries to their employes. The court viewed the statute as violating the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, the privilege of contracting being both a liberty and a property right.<sup>63</sup>

In Pennsylvania, a statute known as the store order act, passed in 1881, which was regarded as an attempt to prevent persons who are *sui juris* from making their own contracts, was declared unconstitutional. "The act," the court said, "is an infringement alike of the right of the employer and the employe; more than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."<sup>64</sup>

<sup>62</sup> 147 Ill. 66 (1893); 160 Ill. 459 (1896); 4 Dist. Rep. (Pa.) 579 (1895).

<sup>63</sup> 141 Ill. 171 (1892).

<sup>64</sup> 113 Pa. 437 (1886), by Gordon, J.



In Kentucky, provision is made by the state constitution that all wages earned in factories, mines, and from corporations shall be paid for in lawful money. It was decided that this provision shall have a reasonable interpretation. Where a workman in that state applies for and receives checks for his wages payable in merchandise, which checks are deducted from his wages on pay day, it is in compliance with the constitution, provided, however, that the wages are paid at reasonable intervals.<sup>65</sup>

22. Certain statutes provide that a person performing work on mines shall have a lien for his work. There is provision in some of these statutes that any person in charge of a mining operation shall be deemed the agent of the owner, thus making the owner of the mine personally liable for the miner's wages, whether he have actually engaged such miner or not. Where such a statute exists, if the workman have knowledge that the man for whom he works is not the owner and is not representing the owner, he is not entitled to his lien for wages on the works of the mine.<sup>66</sup>

Apart from statutory provisions, the mine owner is not responsible for the wages of the workmen who were employed by contractors as subworkmen. It has, however, grown into a custom in districts especially devoted to mining, that the miners or contractors employ their laborers and that the mine operator settles, not only with the miners, but also with the laborers. Thus, it is the custom of certain mining companies, when the time of the laborer is turned in, to pay him his wages and charge the miner's or contractor's account with the amount so paid. In such a case, the company is liable to such laborer to the amount of the funds of the miner it has in its possession. But it is the duty of the laborer to see that his time is properly turned in to the company; and, if the company settle with the miner in absence of any knowledge of wages due by him to the laborer, the company is not liable to him for his wages.<sup>67</sup>

<sup>65</sup> 28 S. W. Rep. 502 (1894).

<sup>66</sup> 46 Pac. Rep. 610 (1896).

<sup>67</sup> 116 Pa. 365 (1887).

Another means by which the statutes looking toward the protection of miners in regard to wages seek to accomplish that end is by prescribing regulations and inspection of the weighing of coal in those mines where weight is the measure of wages.<sup>68</sup> Such statutes have been enacted in Alabama, Illinois, Indiana, Iowa, Kansas, Kentucky, Missouri, New Mexico, Ohio, Pennsylvania, Tennessee, Washington, and West Virginia. In England, the payment of the amount of wages by weight is regulated by the Coal Miners Regulation Act, 1887, which prescribes that persons employed in a mine shall be paid according to the actual weight gotten by them of the mineral contracted to be gotten, and the mineral gotten by them shall be truly weighed at a place as near to the pit mouth as is reasonably practicable. "Mineral contracted to be gotten" means the kind of mineral, that is, coal, ironstone, slate, or fireclay, which the owner is employed to get.<sup>69</sup>

**23.** In Pennsylvania, the principal statute having for its object the weighing of anthracite coal and the payment of wages to miners at the rate of so much per pound was passed in 1875.<sup>70</sup> By its provisions all persons engaged in the mining of anthracite coal in that state must have at each of their collieries standard and lawful scales, and every miner's coal must be separately and accurately weighed on such scale before the coal is dumped and taken from the car on which the miner loaded it. A separate and accurate account of the weight of the coal is prescribed to be kept, according to which account the miner is to be paid. Excepted from the provisions of the statute are any mine operators who may by any contract agree with their employes, otherwise than is provided in the statute, for the compensation for mining. In 1883, a statute to protect miners in the bituminous coal regions of Pennsylvania was enacted, which provides that miners are to be paid for the quantity of coal mined irrespective of size.<sup>71</sup> The third section of this act, which provides penalties for weighing

<sup>68</sup> Barr. & Ad. M. & M., p. 766.

<sup>69</sup> (1891) 1 Q. B. (Eng.) 496.

<sup>70</sup> Pa. P. L. 1875, p. 38.

<sup>71</sup> Pa. P. L. 1883, p. 52.

coal with an incorrect scale, has been declared to be unconstitutional, in that the subject of the section is not clearly expressed in the title.<sup>72</sup>

In Illinois, the statute of 1883, providing for weighing coal at the mines before it is loaded in the cars, and that every mine owner shall furnish a standard track scale for that purpose, is held not to apply to a mine which is operated by machinery and where men are paid by the day;<sup>73</sup> nor does it apply where the mine owner has contracted to pay his employes in some other way than according to the weight of the coal dug, as when they are paid a certain amount for each box of coal mined.<sup>74</sup> This statute, however, is declared unconstitutional, in that it deprives mine operators of the liberty of contracting. In 1895, another statute was enacted in Illinois upon which there appears to have been no construction from a constitutional standpoint.

24. Generally, the statutes in the United States that prescribe the methods for weighing coal as a basis for fixing the wages of miners empower the miners to employ at their own expense a weigh-master, or check-weigher, who is authorized to inspect the scales and keep an account of the weight of the coal mined by each miner, as a check on the amounts accounted for by the mine operator's weighman. In some of the statutes it is prescribed that the check-weigher shall not be considered a trespasser during working hours, and in no manner shall he be interfered with by any person, agent, owner, or miner. It is further prescribed that any person violating the provisions of the statute shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment at the discretion of the court. In Tennessee, under such a statute,<sup>75</sup> it is held that the threatening by a mine owner, that if the miners do not discharge their check-weighman, he would shut down the mines, is not interfering with or intimidating the check-weighman within the provisions of the statute.<sup>76</sup> Under the same statute, in a case in

<sup>72</sup> 5 Dist. Rep. (Pa.) 148 (1895).

<sup>73</sup> 15 Ill. App. 241 (1884).

<sup>74</sup> 110 Ind. 590 (1884).

<sup>75</sup> Tenn. Act, 1887, c. 206, p. 336.

<sup>76</sup> 90 Tenn. 580 (1891).

which the mine operator's weighman was indicted for knowingly and wilfully taking more pounds of coal for a bushel and more pounds for a ton than is provided by law, it was shown that the cars were run upon the scales, and if under twenty-five hundred pounds, they were weighed, but if over that amount, they were not weighed, and the miner was credited with only twenty-five hundred pounds. The defense set up was that this was in accordance with a contract entered into subsequent to the passage of the act, which had been signed by many of the miners, and that the manner of weighing had been in force for a number of years and must have been known by the prosecutor, who had not, however, agreed to the system. The court held that this was not a good defense."

**25.** In England, the several statutes by which the wages of miners are regulated are known as the Coal Miners Regulation Acts, 1887 to 1896, the Coal Miners (Check-Weigher) Act, 1894, and the Truck Act. By the first of these acts, it is provided that no wages shall be paid to any person employed in or about any mine at or within any public house, beer shop, or place for the sale of spirituous or fermented liquor.<sup>77</sup> The provision for paying wages to miners at mines where payment is made depends upon the amount gotten by them, as previously stated.<sup>78</sup> It is further provided that the miners may employ a check-weigher, whose duties and status are similar to those mentioned in the statutes in vogue in the United States. There is provision, however, for the removal of a check-weigher on complaint of the owner, agent, or manager of a mine to any court of summary jurisdiction on the showing of sufficient ground therefor.<sup>80</sup>

The purpose of the Coal Miners (Check-Weigher) Act, 1894, is amendatory of the Coal Miners Regulation Act, 1887, and provides a penalty for interference with the office of check-weigher. If the owner, agent, or manager of any mine, or any person employed by or acting under the

<sup>77</sup> 90 Tenn. 580 (1891).

<sup>78</sup> 50 & 51 Vict., c. 58, Sec. 11.

<sup>79</sup> *Ibid.*, Sec. 12.

<sup>80</sup> *Ibid.*, Sec. 13.

instructions of any such owner, agent, or manager, interferes with the appointment of a check-weigher, or refuses to afford proper facilities for the holding of any meeting for the purpose of making such appointment, or by threats or otherwise attempts to exercise improper influence in respect of such appointment, he shall be deemed guilty of an offense against the Coal Miners Regulation Act, 1887.<sup>81</sup>

The Truck Act, 1831, applies, among other employes, to persons employed "in or about the working or getting of any mine of coal, ironstone, limestone, or salt rock." The word *artificers* means all workmen, laborers, and other persons employed in or about the trades or occupations specified in the act, which provides that the wages of all such persons shall be paid in current coin of the realm or in bank notes; wages not so paid may be recovered. When by agreement, custom, or otherwise, a workman is entitled to an advance on account of wages, no deduction may be made for poundage, discount, or interest. In an action for wages, no set-off is allowed for goods supplied by the employer, and no employer has any right of action against his artificer for goods supplied on account of wages. If the artificer, or his wife or children, become chargeable to the parish, the overseers may recover any wages earned within three months, and not paid in coin or bank-notes. But these provisions do not invalidate the payment of wages in drafts payable to bearer on demand, if the artificer consent. However, an employer or his agent may supply, or contract to supply, to any artificer any medicine or medical attendance, or any fuel, or any materials, tools, or implements for mining purposes, and may demise to him the whole or any part of any tenement at any rent to be thereon reserved, and may advance to him any money for contribution to a friendly society or savings bank, or for relief in sickness, or for the education of his children; and corresponding deductions may be made, or contracted to be made, from the wages of the artificer, if they be not excessive in amount, and if the contract for them be in writing and signed by the artificer.<sup>82</sup>

<sup>81</sup> 57 & 58 Vict., c. 52. Sec. 1.

<sup>82</sup> MacSwain. M., pp. 737-739.



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